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Pages 1132 to 1602

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—*Valley Broadcasters, Inc.*

BC Docket No. 82-436

Application, Failure to Prosecute

Review Board affirms dismissal of application for failure to prosecute. Appellant, which had lost counsel, failed to respond to several important prehearing and discovery pleadings including a motion to dismiss. Additionally, its application was fatally deficient because it had never had reasonable assurance of its transmitter site.

—*Classic Vision, Inc.*

MM Docket No. 85-364

Application, For Review

Application for review of Mass Media Bureau's ruling of December 23, 1985, granting assignment of broadcast license of WZZM-TV, Grand Rapids, Michigan, and denying petition to deny application to assign that license, finding no violation of Fairness Doctrine or personal attack rule denied. Commission affirmed Bureau's ruling as correct and finds application does not contain sufficient grounds to warrant reversal or modification.

—*Wometco WZZM, Inc.*

Automatic Program Identification Service

Notice of Proposed Rulemaking and Notice of Inquiry adopted to establish a means by which all radio emissions might be encoded with a distinct automatically transmitted identifier.

—*Automatic Transmitter I.D. System*

Gen. Docket No. 86-337

Candor

In hearing proceeding involving four mutually exclusive applicants for new TV station, Review Board affirms the ALJ's grant to applicant on standard comparative issue. The Board denied exceptions alleging misrepresentation and lack of candor against winner based on deference to ALJ's credibility findings, its own examination of record, and the lack of a separate misrepresentation issue. The Board also found that the integration proposals of two of the

losing applicants were ploys proffered to garner unjustified comparative preferences.
—*Signal Ministries, Inc.*
MM Docket No. 84-445

(See also: Antenna, Adequacy Issue—*Valley Broadcasters, Inc.*)

CATV Technical Standards

Further Notice of Proposed Rule Making adopted concerning amendment of Parts 15 and 76 relating to terminal devices connected to cable television systems. Commission seeks further comment and information concerning technical standards for cable systems terminal devices (e.g., converters and decoders).
—*Amendment of Parts 15 & 76*
Gen. Docket No. 85-301

Common Carrier, Allowable Expenses

Notice of Proposed Rulemaking adopted to amend Sections 31.235 and 31.607 of Part 31 of Commission's Rules (Uniform Systems of Accounts for Class A and Class B Telephone Carriers). The amendments would permit (1) expensing of costs related to installation and removal of coin stations, and (2) amortization of embedded investment in coin station premises wiring over one year.
—*Amendment of Part 31*
CC Docket No. 86-322

Common Carrier, Interstate

Memorandum Opinion and Order on Reconsideration adopted addressing questions raised in petitions for reconsideration of the *Phase II Order*, 51 FR 1795 (Jan. 15, 1986), and addresses comments filed by seventeen parties.
—*Rates of Return*
CC Docket No. 84-800

Common Carrier, Rates, Just and Reasonable Charges

Complaint filed by MCI alleging that AT&T has violated Sections 201(b) and 202(a) of Communications Act in connection with AT&T's offering of its "Block-of-Time Calling Plan" as set forth in Section 3.2.1 of its Tariff F.C.C. No. 1 denied. Commission concluded that MCI has failed to meet its burden of proof in sustaining its charge that Block-of-Time is unlawful.
—*MCI Telecommunications Corp.*

Common Carrier, Revenue Requirements

Memorandum Opinion and Order adopted regarding the denial of the petitions for waiver of various sections of Part 69, filed by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company, The Bell Atlantic Telephone Companies, Pacific Bell, New England Telephone and Telegraph Company, and BellSouth Corporation, all denied. Petitions generally concerned proper use of the waiver procedure, the basis for granting waivers and interim NTS plans.
—*Access Charges*

Common Carrier, Service, Need For

Notice of Proposed Rulemaking adopted to develop policies and guidelines concerning applications for facilities to provide common carrier telecommunications services between the island of Puerto Rico and off-island points. Commission examines applications and other pleadings that have been submitted, request further information from the parties, raise options in disposing of particular applications and reach certain tentative conclusions.

—*Common Carrier Facilities*

CC Docket No. 86-309

Complaint, Common Carrier

(See: Common Carrier, Rates, Just and Reasonable Charges—*MCI Telecommunications Corp.*

Declaratory Ruling

Request for Declaratory Ruling to find a multiple licensed business radio station in Morgan City, Louisiana, is functioning as a private land mobile service within Sec. 331(c)(1) of Communications Act and not subject to state rate and entry regulation granted. Commission found cease and desist order issue by Louisiana PSC without force and effect.

—*Data Com. Inc.*

Dismissal of Application,

(See: Application, Failure To Prosecute—*Classic Vision, Inc.*)

Diversification

(See: Candor-*Signal Ministries, Inc.*)

Ex Parte, Communications by Applicants and Privies

Notice of Proposed Rule Making adopted regarding comprehensive revision of Subpart H, Part 1 of Commission's rules and regulations concerning ex parte communications and presentations in Commission proceeding. A major objective of this proceeding is to develop rules that are easier to understand and apply. In addition, proposed revisions are expected to remedy problems experienced under the current rules.

—*Ex Parte Communications*

Gen. Docket No. 86-225

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(See: Application, For Review—*Wometco WZZM, Inc.)*

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—*George Edward Gunter*

MM Docket No. 83-1305

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(See: Antenna, Adequacy Issue—*Valley Broadcasters, Inc.*)

Harassment
(See: Antenna, Adequacy Issue—*Valley Broadcasters, Inc.*)

Identification Automatic System
(See: Automatic Program Identification Service—*Automatic Transmitter I.D. System*)

Integration of Management and Ownership, See Ownership
(See: Candor—*Signal Ministries, Inc.*)

Interstate Communications
(See: Common Carrier, Interstate—*Rates of Return*)

Misrepresentation
(See: Candor—*Signal Ministries, Inc.*)

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Notice of Inquiry adopted into scrambling of satellite television signals and access to those signals by owners of home satellite dish antennas. Commission's objective is to develop a broad and detailed record concerning scrambling.
—*Scrambling of Satellite TV Signals*
Gen. Docket No. 86-336

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Private Land Mobile Service
(See: Declaratory Ruling—*Data Com. Inc.*)

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Report and Order adopted terminating proceeding regarding technical standards for the Direct Broadcast Satellite Service. Commission continues to believe industry groups provide appropriate mechanism for study and resolution of technical issues at this stage of development.
—*Direct B/C Satellite Service*
MM Docket No. 85-32

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(See: Common Carrier, Interstate—*Rates of Return*)

Rules, Amendment of
Report and Order adopted amending Section 90.81 of rules regarding Telephone Maintenance Radio Service. Rule revised to conform to the post-divestiture structure of telephone industry. This action also enhances utilization of existing TMRS frequency allocation, obviates

the need to dislocate the operations of any TMRS licensees and removes the need for certain TMRS licensees to construct duplicate radio systems to meet rule requirements.
—*Amendment to Section 90.81*
PR Docket No. 84-884

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Notice of Proposed Rulemaking adopted to modify rules governing low power TV and TV translator service. Commission is convinced that rules, policies and processes should not hinder the potential viability of low power TV stations or inhibit expansion of TV translator service.
—*Low Power TV/TV Translator Service*

(See: CATV Technical Standards—*Amendment of Parts 15 & 76*)

(See also: Common Carrier, Allowable Expenses—*Amendment of Part 31*)

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Site Availability
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Waiver
(See: Common Carrier, Revenue Requirements—*Access Charges*)

Common Carrier, Revenue Requirements
Waiver

Memorandum Opinion and Order. adopted regarding the denial of the petitions for waiver of various sections of Part 69, filed by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company, The Bell Atlantic Telephone Companies, Pacific Bell, New England Telephone and Telegraph Company, and BellSouth Corporation, all denied. Petitions generally concerned proper use of the waiver procedure, the basis for granting waivers and interim NTS plans.
—*Access Charges*

FCC 86-145

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules, filed by the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company, the Bell Atlantic Telephone Companies, Pacific Bell, New England Telephone and Telegraph Company, and BellSouth Corporation

MEMORANDUM OPINION AND ORDER

Adopted: April 3, 1986; Released: April 28, 1986

BY THE COMMISSION: COMMISSIONER PATRICK CONCURRING AND ISSUING A SEPARATE STATEMENT.

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I. Introduction

1. During the last three months of 1985, petitions for waiver of various sections of Part 69 of our rules[1] were filed on behalf of Bell Operating Companies (BOCs) in five different regions of the country.[2] Most of these BOCs seek waivers in order to collect their interstate non-traffic-sensitive (NTS) carrier common line revenue requirements through charges other than the Carrier Common Line Charge (CCLC) established in Part 69. One BOC also seeks waiver of Part 69 rules relating to other access elements. We sought comment on the waiver petitions through

[1] 47 C.F.R. Part 69 (1985).

[2] The five sets of petitioners, and the dates their petitions were filed, are as follows: (1) the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Compnay, and Pacific Northwest Bell Telephone Company (US West), October 15, 1985; (2) the Bell Atlantic Telephone Companies (Bell Atlantic), October 28, 1985; (3) Pacific Bell (Pacific), November 26, 1985; (4) New England Telephone and Telegraph Company (New England), December 3, 1985; and (5) BellSouth Corporation (BellSouth), December 18, 1985. On March 7, 1986, Southwestern Bell Telephone Company filed a similar petition for waiver, which it has since withdrawn. Public Notices (Mimeo Nos. 3124 & 3937, released March 13 and April 21, 1986).

four separate Public Notices.[3] One hundred and three comments and 44 reply comments were filed in response.[4] By this Order, we deny the petitions as filed, but get forth guidelines for approval of interim NTS proposals filed in the future.

2. This Order begins in Part II with a short summary of the history of our access charge plan by way of background for our analysis of these waiver petitions. Part III describes the five waiver petitions under review.[5] Part IV considers those issues that bear generally on whether we should grant any waiver and, if so, whether we should limit the number of different interim NTS plans.[6] Part V examines those issues raised by specific characteristics of the five proposals.[7] Finally, Part VI summarizes the guidelines for future interim NTS plans.[8]

II. Background

3. On December 22, 1982, we adopted the Third Report and Order in the MTS/WATS Market Structure proceeding, CC Docket No. 78-72 (*Access Charge Order*),[9] which established a

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[3] We initially established a pleading cycle for the US West petition (Mimeo No. 0423, released Oct. 21, 1985) and subsequently consolidated consideration of the Bell Atlantic petition in the same pleading cycle (Mimeo No. 0676, released Nov. 1, 1985). We established a second consolidated pleading cycle for the Pacific and New England petitions (Mimeo No. 1309, released Dec. 6, 1985) and a third pleading cycle for the BellSouth petition (Mimeo No. 1680, released Dec. 24, 1985). During November 1985, Western Union and MCI filed separate motions requesting that Bell Atlantic and US West, respectively, be required to submit additional information. After review of the petitioners' responses, which did provide additional information, the Common Carrier Bureau dismissed MCI's motion against US West as moot, but ordered Bell Atlantic to file a statement setting forth some of the assumptions underlying its estimates. In light of the new information submitted by US West and Bell Atlantic, the Bureau also extended the date for filing comments on their petitions. *See* Petitions by US West Operating Companies and Bell Atlantic, Order (Common Carrier Bureau) (Mimeo No. 1029, released Nov. 21, 1985). In a subsequent order, the Bureau extended the date for filing replies on these two petitions in response to a motion by the National Association of Regulatory Utility Commissioners (NARUC). Petitions by US West Operating Companies and Bell Atlantic, Order (Common Carrier Bureau) (Mimeo No. 1442, released Dec. 12, 1985).

[4] A comprehensive list of pleadings filed in response to the Public Notices is attached as an Appendix.

[5] *See infra* paras. 9-22.

[6] *See infra* paras. 23-66.

[7] *See infra* paras. 67-144.

[8] *See infra* paras. 145-149.

[9] MTS/WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983) (hereinafter *Access Charge Order*), *modified on reconsideration*, 97 FCC 2d 682 (1983) (hereinafter *First Reconsideration Order*), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (hereinafter *Second Reconsideration Order*), *aff'd in principal part and remanded in part, National Ass'n of Regulatory Utility*

system of tariffed access charges for the recovery by local telephone companies of most of their facility costs assigned to the interstate jurisdiction through the separations process. In the *Access Charge Order*, we adopted rules under which local exchange carriers (LECs) would recover interstate NTS costs partly from subscribers and partly from interexchange carriers (IXCs).[10] We required that, beginning in 1984, LECs levy a flat monthly "subscriber line charge"[11] (SLC), in combination with a charge based on usage, directly on end users. The SLC was to be at least $2.00 per line per month for residential subscribers and $4.00 per line per month for business subscribers. The maximum to be collected through usage charges was to be the LEC's rate for a dedicated access line. We did, however, permit the LECs considerable flexibility to experiment with differing combinations of flat and usage charges.[12] NTS costs not recovered directly from subscribers would be collected from IXCs through Carrier Common Line Charges (CCLCs), which would be reflected in their toll rates.[13] The *Access Charge Order* provided that the SLC gradually would be increased until nearly all local loop costs were recovered directly from subscribers.[14] We concluded that this mechanism for NTS cost recovery would achieve the four primary goals of this proceeding,[15] and would move us toward a more

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Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224, 1225 (1985), *modified on further reconsideration*, 49 Fed. Reg. 46,383 (1984), 50 Fed. Reg. 18,249 (1985) *aff'd on further reconsideration*, 50 Fed. Reg. 43,707 (1985), *appeal docketed, U.S. Telephone, Inc. v. FCC*, No. 84-1115 (D.C. Cir. March 23, 1984).

[10] NTS costs include the cost of all equipment that a subscriber would need to access the local exchange switch, including terminals and other customer premises equipment (CPE), the inside wire between the CPE and the demarcation point, and the line or loop between the customer's premises and a local exchange switch or a manual switchboard. *Access Charge Order* at para. 90. Also included among the NTS costs collected through access charges are the NTS costs of connecting pay telephones to the network and contributions to a newly established Universal Service Fund (USF). *See First Reconsideration Order* at paras. 55–62; *Access Charge Order* at para. 138.

[11] "Subscriber line charge" is the term now commonly used for the flat fee. The *Access Charge Order* and Part 69 rules refer to this fee as the "End User Common Line Charge."

[12] *See Access Charge Order* at paras. 5, 176–94.

[13] CCLCs were to recover the costs of embedded CPE, inside wiring, pay telephone, and the Universal Service Fund (USF), as well as any local loop costs not recovered through SLCs. *See* 47 C.F.R. §§ 69.501 — 69.502.

[14] Most NTS costs were to be shifted to the flat SLC by 1989, and end user charges were to be converted entirely to the SLC by 1991. *See Access Charge Order* at paras. 145–47, 183–85.

[15] We found that a system of fixed charges would be consistent with the goals of the Access Charge proceeding:

(1) Eliminate the discrimination or preferences that result from the

economically rational system of recovering these costs.

4. On reconsideration, we modified this plan for recovering interstate local loop costs. We reaffirmed our commitment to the four goals and the basic approach of the *Access Charge Order*, but nevertheless concluded that the transition to SLCs should be more gradual and that access costs should be distributed more equitably among all categories of users of access services. We eliminated the end user usage charge and established a uniform initial SLC of $2.00 per month for residential customers in 1984. That charge was to increase to $3.00 per month in 1985 and $4.00 in 1986. The revised rules also provided that business customers would pay an SLC equal to the lesser of $6.00 per month or the relevant area's full interstate allocation of loop costs. Interstate local loop costs not recovered through SLCs were to be recovered from CCLCs. Transition to full SLCs was to be complete by 1990.[16] Although LECs were to be granted less formal flexibility under this modified plan, we identified petitions for waiver as an appropriate means for LECs to obtain needed flexibility in the collection of access charges.[17]

5. We revisited this subject again early in 1984, in our *Second Reconsideration Order*, when we once again reaffirmed our conclusion that a system of flat SLCs to recover the major portion of the interstate NTS cost allocation would best serve the public interest. We emphasized as well that the access charge plan represented an effort to preserve the opportunity for fair interexchange competition during the transition to a new environment of equal access for all competitors. We then proceeded to implement the maximum $6.00 monthly charge for multi-line business customers. We deferred implementation of SLCs for residential and single-line business customers until June 1985, however, and capped such charges at $4.00 through the end of

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inconsistent methods that have been used to recover interstate subscriber loop and private line loop costs;

(2) Promote economic efficiency by eliminating the distortions that inevitably result from the recovery of fixed costs through usage charges;

(3) Deter uneconomic bypass by removing the incentive for large users to substitute bypass facilities that may be more costly than the local distribution facilities of the telephone companies; and

(4) Preserve universal telephone service by avoiding rate increases for remaining telephone company customers that would result from uneconomic bypass.

Second Reconsideration Order at para. 6.

[16] *See First Reconsideration Order* at paras. 29–34.

[17] *See id.* at para. 35.

1989.[18] Furthermore, we stated that we would complete five additional proceedings before allowing SLCs to become effective for residential and single-line business customers.[19]

6. In late 1984, in response to our request, the Joint Board in CC Docket No. 80-286 made several recommendations concerning issues related to NTS cost recovery.[20] We adopted these recommendations,[21] which among other things provided for implementation of an SLC of $1.00 per month for residential and single-line business customers, effective June 1, 1985. This charge is to increase to $2.00 per month effective June 1, 1986. In addition, LECs were given additional flexibility to combat localized bypass problems by implementing, with the concurrence of state regulatory commissions or the Joint Board, optional alternative tariffs or experimental tariffs for the recovery of certain NTS costs.[22]

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[18] *See Second Reconsideration Order*, at paras. 4-20; 47 C.F.R. § 69.202.

[19] These five proceedings were: (1) a further rulemaking to devise exemptions or targeted assistance for subscribers who may not be able to afford SLCs; (2) a further inquiry into the effects on universal service of SLCs as well as federal decisions in general; (3) a further inquiry to compile more detailed data upon the extent and dangers of bypass; (4) a further rulemaking to adopt more effective mechanisms to meet the needs of small telephone companies for additional assistance; and (5) a further rulemaking to examine how best to implement SLCs for residential and single-line business customers. The first, fourth, and fifth proceedings were completed at the end of 1984. *See Recommended Decision, infra* note 20, and *Decision and Order, infra* note 21. Staff studies addressing the second and third issues, published as Commission Reports, were completed in December 1984. *See* Further Report on the Effects of Federal Decisions on Universal Telephone Service, Order, CC Docket No. 78-72, Phase IV, FCC 84-636 (released Jan. 4, 1985); MTS/WATS Market Structure, Order, CC Docket No. 78-72, Phase I, FCC 84-635 (released Jan. 18, 1985) (hereinafter *Bypass Order*).

[20] *See* MTS/WATS Market Structure and Amendment of Part 67, Recommended Decision and Order by the Federal-State Joint Board, 49 Fed. Reg. 48,325 (1984) (hereinafter *Recommended Decision*).

[21] *See* MTS/WATS Market Structure and Amendment of Part 67, Decision and Order, 50 Fed. Reg. 939 (released Dec. 28, 1984) (hereinafter *Decision and Order*); 47 C.F.R. § 69.203.

[22] Optional alternative and experimental tariffs are "those that involve additional flat rate recovery of NTS costs from subscribers require modification of the NTS pooling requirements contained in Part 69 of the Commission's rules, or require changes in jurisdictional separations." MTS/WATS Market Structure and Amendment of Part 67, Memorandum Opinion and Order, CC Docket Nos. 78-72 and 80-286, FCC 86-56, para. 14 n.30 (released Jan. 30, 1986). The difference between the two kinds of tariffs is as follows: Optional alternative tariffs allow LECs to modify their method of collecting the carrier common line revenue requirement through such means as volume discounts, funding any revenue shortfall through a uniform flat surchange on all customers. By contrast, experimental tariffs allow LECs to modify their method of collecting their entire interstate NTS costs through such means as separations changes to allow substitution of intrastate recovery mechanisms for the SLC or comprehensive unified interstate and intrastate access charge plans. *See Recommended Decision* at paras. 35-44; 47 C.F.R. § 69.204. *See also* MTS/WATS Market

7. The SLC for residential and single-line business customers will remain frozen after June 1, 1986, until the Joint Board conducts a further proceeding to examine the effect of SLCs and the special anti-bypass tariffs on universal service, bypass, economic efficiency, and interexchange competition. On the basis of this examination, the Joint Board will recommend what further steps this Commission should take to implement a more economically rational system for recovering interstate NTS costs.[23]

8. Thus, under the currently applicable rules, the uneconomic recovery of NTS costs continues. The common line revenue requirement, which consists principally of the costs of providing the local loop between the end user and the telephone company's central office, is collected through two rate elements — the SLC and the CCLC. The SLC for residential and single-line business subscribers is $1.00 per access line, to be increased to $2 per line as of June 1, 1986. The SLC for multi-line business subscribers reflects the particular area's interstate NTS allocation, up to a cap of $6 per access line. Revenues obtained from the SLC are subtracted from the total common line revenue requirement to yield the carrier common line (CCL) revenue requirement, which is recovered from IXCs through the CCLC, a charge per access minute of use. IXCs include the CCLC in their toll rates. This loading of interstate toll rates with NTS costs on a usage-sensitive basis requires high-volume users of the public switched network to pay substantially more of NTS costs than do low-volume toll users and to pay substantially more than the NTS costs associated with providing their own local loops. This system thus provides incentives for high-volume users to seek alternative methods of access to their IXCs under which they pay charges more in line with the costs they cause in obtaining access.

Structure and Amendment of Part 67, Memorandum Opinion and Order, CC Docket Nos. 78-72 and 80-286, FCC 85-71 (released Feb. 26, 1985) (hereinafter *Optional Alternative Tariff Order*); MTS/WATS Market Structure, Decision and Order, CC Docket Nos. 78-72 and 80-286, FCC 85-529 (released Oct. 8, 1985).

[23] *See Recommended Decision* at para. 13. We recently made an additional change in our Part 69 rules to reflect a separations rules change providing for direct assignment of the costs of the closed ends of WATS lines. Effective June 1, 1986, WATS closed ends will be treated as special access lines for access charge purposes. These lines will no longer pay the CCLC but will pay their fixed (NTS) costs directly through flat charges. *See* WATS-Related and Other Amendments of Part 69 of the Commission's Rules, Report and Order, CC Docket No. 86-1, FCC 86-115, 51 Fed. Reg. 10839 (released March 21, 1985) (hereinafter *WATS Access Charge Order*).

III. The Petitions

A. US West Waiver Petition

9. On October 15, 1985, Mountain Bell, Northwestern Bell, and Pacific Northwest Bell (US West) filed a petition for waiver of our rules requesting that they be permitted to implement two new access service rate elements in place of the CCLC.[24] In its petition, US West contends that the Commission's ability to achieve the four goals of the *Access Charge Order* is ultimately dependent on the implementation of economically rational, *i.e.*, cost-based, prices for all telecommunications services. US West believes that the current method of recovering NTS costs is increasingly jeopardizing the full achievement of these goals. US West states, for instance, that is has recently received significant quantities of orders for DS1 circuits that link IXCs to end users or to resale carriers. US West also states that it has received significant quantities of orders for DS1 circuits to link AT&T with end offices serving large concentrations of high-volume WATS customers. US West has concluded that many of these lines are not going to be used for private line services because they are going to be multiplexed to voice level.

10. The two new rate elements proposed by US West to replace the CCLC are a Transitional Line Charge (TLC) and a Terminating Usage Charge (TUC). The TLC, which would recover the bulk of the current CCL revenue obligation, would be a flat charge imposed on IXCs based on the number of subscriber lines they serve with preferred dialing access (1+ access for interstate long distance service) and 800 service access lines.[25] Every three months, the monthly TLC rate per line would be recalculated by dividing the TLC revenue obligation by the total number of 1+ and 800 access lines in the study area. Each IXC's monthly payment would then be calculated by multiplying this rate by its number of 1+ and 800 access lines. The second rate element, the TUC, would be a per minute charge imposed on all terminating

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[24] On December 17, 1985, the US West Operating Companies filed tariff revisions to implement the plan set out in their petition. (*See* Transmittal Nos. 742, 1040, 204.) In light of subsequent changes to the access charge rules adopted in the *WATS Access Charge Order* (*see supra* note 23), the US West Operating Companies filed additional tariff revisions on March 26, 1986, withdrawing the pending rates and regulations associated with their plan. (*See* Transmittal Nos. 770, 1068, and 229.)

[25] US West clarified in its reply that closed-end 800 access lines would be subject to the TLC. US West Reply Comments at 39.

minutes of use, except those associated with 800 and 800-like services. The TUC would be used to recover a "miscellaneous revenue obligation,"[26] which would be divided by the number of forecasted terminating minutes of use to determine the level of the TUC. US West argues that, while recovery of any NTS costs from IXCs is undesirable, it is more rational to levy such IXC charges on a flat basis (through the TLC) than through the usage-sensitive CCLC. US West also argues that the TUC would ensure that all IXCs pay a portion of NTS costs. Finally, US West maintains that it has designed its proposal to be transparent to the mandatory pool of NTS costs and revenues administered by the National Exchange Carrier Association (NECA). It intends to remit proceeds to NECA as is presently done (*i.e.*, on the basis of the CCLC and actual access minutes) and to receive the same monthly revenue from the NECA pool.[27]

B. Bell Atlantic Waiver Petition

11. On October 28, 1985, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a similar petition requesting waiver of various sections of Part 69 of our rules.[28] Bell Atlantic's petition argues that the current economically irrational structure of access rates unreasonably and unnecessarily increases the LECs' bypass risk. Bell Atlantic asserts that, while any recovery of subscriber line costs from IXCs is economically unsound, the usage-based recovery of those costs so inflates the price of switched access that high-volume customers are in effect invited to bypass the switched network.[29] Moreover, Bell Atlantic argues, IXCs and high-volume end users already are using current tariff alternatives and developing new technologies to provide MTS- and WATS-like services without incurring switched access charges. Bell Atlantic cites AT&T's recently approved Software Defined Network (SDN), Megacom, and Megacom 800 service offerings as examples of this

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[26] This portion of the CCL revenue requirement would include costs associated with the CPE phase-out, the amortization of inside wiring, Pay Telephone Common Line, and the Universal Service Fund.

[27] US West Waiver Petition at 17-18. *See also* US West Reply Comments at 29-30.

[28] On the same day, Bell Atlantic filed a petition for rulemaking urging us to initiate a rulemaking proceeding to amend our rules on the operations of the NECA pool. We established an independent pleading cycle for that petition, which is being consideration separately. Petitions for Rulemaking by Bell Atlantic and the New Jersey Board of Public Utilities, RM-5205 (petitions filed October 21, 1985 and November 7, 1985).

[29] Bell Atlantic Waiver Petition for at 8-9.

phenomenon.[30] Even without Megacom and SDN, Bell Atlantic states that it is experiencing growing demand for high-capacity facilities to connect end users directly to IXCs.[31]

12. Bell Atlantic's petition proposes to recover the entire CCL revenue requirement through flat charges paid by the IXCs. These costs would be allocated among IXCs based on their proportion of the study area's total "access facility connections." Access facility connections would include Feature Group A lines; Feature Group B, C, and D trunks; and any voice-grade or voice-grade-equivalent facilities, whether provided by the LEC, the IXC, or a private vendor. An IXC thus would not be able to reduce its NTS contribution by substituting special access or private system facility connections to end users for switched access.

13. Because Bell Atlantic would have difficulty determining the number of each IXC's access facility connections, its proposal would require each ICC to report annually its number of such connections.[32] Bell Atlantic would use these reports to calculate each IXC's proportion of total access facility connections and would bill the IXCs on a monthly basis for that year. Additionally, Bell Atlantic contends that its plan can be implemented without any effect on the NECA pool by basing its remittance obligation to the pool on the CCLC and actual minutes of use.[33]

C. Pacific Bell Waiver Petition

14. On November 26, 1985, Pacific Bell (Pacific) filed its petition for waiver of various sections of Part 69. In its petition, Pacific observes that a high-volume customer pays NTS costs substantially in excess of the economic costs actually associated with providing its local loops, giving rise to significant "marketplace motivation to avoid bearing uneconomically allocated NTS costs."[34] Pacific notes this Commission's recognition that service bypass will be the most prevalent form of bypass in the next few years and contends that AT&T's SDN and Megacom services will

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[30] *Id.* at 9.

[31] *Id.* at 12. Bell Atlantic notes that from January to May, 1985, demand from DDS circuits rose by nearly 40 per cent.

[32] If discrepancies appear in the count, the LEC would have a reasonable opportunity to challenge the IXC's report.

[33] Bell Atlantic Reply Comments at 11. Bell Atlantic originally proposed to base its remittance on forecasted minutes of use, but revised its plan in response to commenters' objections.

[34] Pacific Waiver Petition at 4.

worsen what it already regards as an untenable situation.[35]

15. In order to ameliorate this problem, Pacific proposes to institute a flat-rate recovery plan for the NTS costs of switched access services. After adjusting its total NTS revenue requirement (including revenue collected through SLCs) to reflect receipts from or payments to the NECA CCL pool,[36] Pacific would divide that requirement into originating and terminating categories based on the proportion of each to total switched access minutes. Pacific would then reduce the originating revenue requirement by the revenues generated by SLCs as well as revenues from its proposed special access rate element. Pacific would next determine the flat charge for each IXC based on its proportion of originating and terminating switched access minutes. Historical data for the three months preceding the allocation would be used to establish the carriers' proportion of Feature Groups A, B, C, and D traffic. The flat charge for each IXC would be determined annually and billed in monthly installments.

16. Pacific proposes to assess a new special access rate element on all special access lines capable of transmitting voice.[37] The charge would be imposed on a voice-grade-equivalent basis and initially would be set at $25 per circuit per month. Pacific states that it would reevaluate the level of this charge annually and would make adjustments in subsequent years depending on such factors as the degree to which service bypass grows or declines. Pacific expects this new rate element to (1) provide IXCs with a more realistic economic choice between switched access and voice-equivalent special access services, which would discourage service bypass; and (2) recover a portion of NTS costs from special access services during the transition to end user charges.[38]

17. Pacific states that its application of revenues from SLCs and new special access charges as well as interstate NTS cost reductions from separations changes toward reduction of the

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[35] Pacific Waiver Petition at 3.

[36] Pacific states that it receives payments from the pool. Pacific would remit to NECA on the basis of the CCLC and actual minutes of use. Pacific Waiver Petition at 14; Pacific Reply Comments at 13.

[37] Pacific emphasizes that this rate element is not intended to be a surrogate special access surcharge, which addresses the "leaky PBX" phenomenon. *See* Clarification of Section 69.5 and 69.115 of the Commission's Rules, Memorandum Opinion and Order, 50 Fed. Reg. 12,254, paras. 3-5 (1985).

[38] Pacific states that it expects IXCs to recover this additional cost of special access from end users of special access services. This would ensure that end users making the choice between switched and special access services would be confronted with the price relationship that Pacific intends to create by introducing the new special access rate element.

originating revenue requirement would lower incentives for service bypass. After the originating revenue requirement was reduced to zero, which Pacific projects would occur in calendar year 1987, further adjustments would be applied to the terminating category.

D. New England Telephone Waiver Petition

18. On December 3, 1985, New England Telephone and Telegraph Company (New England) filed its petition for waiver of various sections of Part 69. In its petition, New England contends that this Commission's ability to achieve our four access charge goals depends to a large measure on whether we continue moving toward economically rational, *i.e.*, cost-based, pricing for access service. New England argues that the current rules result in the recovery of substantial amounts of NTS and traffic-sensitive (TS) costs from the IXCs in an uneconomic and inefficient manner.[39] According to New England, these rules are causing the IXCs to develop bypass options to avoid access charges, their single largest cost.[40]

19. New England proposes to bill end users directly for most switched access services provided originating interstate calls. This new charge would include not only NTS costs, but also the TS costs associated with delivering calls to the IXC's point-of-presence (POP) and the Billing and Collection costs associated with billing end users directly for access service. Charges would be assessed per conversation minute of use for all Feature Group C and D traffic, as well as for Feature Group A and B (FGA and FGB) traffic in converted end offices, pursuant to a tapered rate schedule providing volume discounts to end users in both NTS and TS rates. These volume discounts would be based on an end user's total interstate minutes regardless of which, or how many, IXCs are accessed. The highest rate would be applicable to usage below 200 conversation minutes per month. High-volume users would make no NTS contribution for usage above 7000 conversation minutes per month.[41] At first, New England proposed to bill IXCs for originating non-premium FGA and FGB traffic pursuant to the currently effective switched access non-premium rate structure. New England has modified its proposal to provide such

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[39] New England Waiver Petition at 2.

[40] *Id.* at 5. As examples of this phenomenon, New England cites AT&T's SDN and Megacom services and the Merrill-Lynch/Teleport facilities constructed to connect customers in New York City directly to AT&T.

[41] Under its proposal New England proposes to remit to the NECA pool the current obligation based on the July 1985 Annual Access Service filing. New England Waiver Petition at 8.

IXCs with three options.[42] New England is assuming that AT&T would reduce its MTS and WATS rates in New England territories to reflect its reductions in costs for originating access and Billing and Collection services.

20. Originally, New England proposed to recoup discounts on TS charges by increasing certain special access voice grade services. This, New England contended, would further discourage uneconomic bypass by "improving the price relationship between artifically inflated switched access and special access."[43] New England has now proposed to recover revenue lost through the TS volume discount within the TS taper itself.

E. BellSouth Waiver Petition

21. BellSouth filed its petition for waiver of various sections of Part 69 on December 18, 1985. BellSouth argues in its petition that, absent immediate action by the LECs to introduce a more efficient access pricing structure, significant uneconomic bypass will occur in the short term. Moreover, BellSouth contends, unless the LECs immediately take interim steps to address the present incentives for uneconomic bypass, the long-term solution of imposing NTS costs on the cost-causative end user may never be fully effective because some irreversible bypass will have occurred.[44] BellSouth concludes that the Commission must take steps to reduce the uncertainty caused by the lengthy transition to full end user charges in order to reduce incentives for uneconomic bypass.[45]

22. Under its proposal, BellSouth would recover the CCL revenue requirement by allocating its NTS costs to IXCs through three new rate elements. The three rate elements are a Transitional Fixed Charge (TFC), a WATS Access Line Charge, and a Terminating Usage Charge (TUC). The heart of the proposal is the TFC, a flat charge that would apply in lieu of the CCLC to originating MTS, MTS-like, and 800 services. The TFC revenue requirement[46] would be allocated among IXCs based on their

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[42] The IXC could choose (1) to have its FGB end users included under the proposal (and the IXC could convert end users from FGA to FGB without charge for these purposes); (2) to be billed by New England at a flat rate of $104 per FGA or FGB line or trunk, plus a usage-sensitive TS rate of .97 cents/minute, which includes a 55% nonpremium discount; or (3) to continue paying the CCLC. New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 21–22.

[43] New England Waiver Petition at 8.

[44] BellSouth Waiver Petition at 3.

[45] *Id.* at 3–4.

[46] The TFC would collect the CCL revenue requirement not collected through the

proportion of the total ordered and installed switched access capacity, as expressed in Busy Hour Minutes of Capacity (BHMC). Each IXC's BHMC would be determined annually, and the BHMC of IXCs other than AT&T would be adjusted to reflect nonpremium access.[47] The WATS Access Line Charge would be applied to each closed-end WATS and 800 Service access line.[48] Initially, this charge would be established at the same level as a voice-grade-equivalent special access line. The TUC would apply the current NECA CCLC rate to all terminating usage except for 800 service. BellSouth would use forecast minutes of use and revenue requirements to report to the NECA pool, which it asserts would ensure that NECA's rate development and administrative functions would be fully insulated from the effects of its plan.[49]

IV. General Issues Raised by the Waiver Petitions

23. Petitioners and commenters raise a wide range of issues bearing on whether we should grant the five requested waivers. Some of the issues concern generally whether we should grant any waiver of our Part 69 rules respecting the CCLC and, if so, whether we should limit the number of different interim NTS plans. Other issues relate more specifically to the particular characteristics of the five proposals. We here examine the first set of issues and determine that waivers are appropriate in these circumstances, but that guidelines are necessary to place limits on interim NTS plans. In the next Part, we will consider plan-specific issues in order to establish two models for interim NTS plans filed in the future.

WATS Access Line Charge or the TUC.

[47] Under BellSouth's original proposal, all services ordered on a per line or trunk basis were assumed to have thirty BHMC per line or trunk for purposes of applying the TFC. In its replay, BellSouth has modified this aspect of its proposal so as to convert capacity ordered on a per line or trunk basis to BHMC according to industry-accepted network engineering tables it now employs to convert orders for a quantity of BHMC into a specified number of lines or trunks. BellSouth Reply Comments at 12.

[48] At the time of its filing, BellSouth recognized that it might be required to modify this aspect of its proposal to conform with any actions we might take in connection with the recovery of costs related to the closed end of WATS. BellSouth Waiver Petition at 8.

[49] BellSouth originally proposed to report to the pool on the basis of actual minutes of use. In light of the comments, BellSouth modified its plan in reply to use forecasted minutes of use. It now contends that this method would be a better way to insulate the pool from any effects of its plan and that it would, in effect, guarantee the pool a 12.75 per cent return on the BellSouth portion of NTS investment. BellSouth Reply Comments at 16–17.

24. The general issues raised by the waiver petitions fall into five different categories: (1) whether use of the waiver procedure is proper; (2) whether there is a basis for the granting of waivers, (3) whether any interim NTS plan can be consistent with our long-term access charge plan, (4) whether the implementation of interim NTS plans would fatally jeopardize four major benefits of nationwide uniformity in NTS cost recovery, and (5) whether interim NTS plans can coexist with the mandatory NECA NTS pool.

A. Comments

1. Use of the Waiver Procedure

25. Many of the commenters opposing the waiver petitions do so on procedural grounds. Their first contention is that the relief requested should, as a matter of law and policy, be the subject of a rulemaking proceeding, rather than waiver proceedings. Some commenters also argue that the NTS proposals contained in the petitions constitute optional alternative tariffs or experimental tariffs that should first be referred to the Federal-State Joint Board or to the state commissions in the relevant states.

26. The commenters arguing that we should consider these waiver petitions in a rulemaking proceeding present two reasons in support of their position. They first assert that the grant of these waiver requests would be unlawful. For instance, GTE Sprint argues that granting the requested waivers would unlawfully eviscerate Part 69.[50] ARINC contends that these proposals really seek rule changes that cannot be accomplished through waiver requests.[51] ALC agrees, arguing that, to the extent that a common problem exists with regard to the collection of NTS costs through the CCLC, a rulemaking is the appropriate means of rectifying it.[52] The second reason advanced is that a rulemaking proceeding would be more appropriate as a matter of policy. GTE Sprint argues, for example, that a rulemaking is proper because the proffered justifications for waivers are matters affecting the entire industry that should be addressed in a rulemaking.[53] GTE Sprint contends as well that, because our access charge plan balances goals other than the prevention of uneconomic bypass, we should exercise our judgment in devising an alternative NTS

[50] GTE Sprint Comments on New England/Pacific Waiver Petitions at 6.
[51] ARINC Comments on BellSouth Waiver Petition at 2-4.
[52] ALC Comments on New England/Pacific Waiver Petitions at 5-6.
[53] GTE Sprint Comments on BellSouth Waiver Petition at 3-7.

cost recovery plan in a rulemaking, rather than allow the LECs to design plans that focus solely on the uneconomic bypass concern.[54] Other policy arguments made by commenters in favor of a rulemaking are that such a comprehensive proceeding is necessary to allow us (i) to consider the impact of the proposals on the NECA pool and the administrative costs that would be imposed by the plans,[55] (ii) to maintain a nationwide focus on the transition to recovery of NTS costs from end users,[56] and (iii) to address all the various issues raised in an efficient and effective manner.[57]

27. Some parties contend that the NTS proposals constitute optional alternative tariffs or experimental tariffs that should be considered first by the Federal/State Joint Board or by state commissions in the affected states. For instance, ARINC argues that a specific procedure for approving alternative NTS cost recovery proposals already exists that requires petitioners to present their various proposals to their state PUCs or to the Joint Board.[58] Similarly, NTCA asserts that we should examine these proposals through the Joint Board process in a single comprehensive proceeding.[59]

28. The petitioners reply that waiver petitions are an appropriate method for seeking the relief requested. They argue that their proposals are of only limited applicability. They are not requesting that we impose their plans on other LECs subject to Part 69, and they are not seeking to modify Part 69 permanently.[60] In sum, they assert that their petitions seek only a limited exception to the rules, precisely the sort of relief for which the waiver process is intended. US West argues as well that a rulemaking proceeding is unnecessary and that the public interest would be served by allowing some deviation from the present rules in order to gain actual experience on the effect of different rate structures on the functioning of the market.[61] Southwestern Bell, in support of petitioners, contends that an immediate response to serious service bypass problems cannot await the conclusion of a rulemaking proceeding,[62] and that specific objections to the waiver

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[54] GTE Sprint Comments on BellSouth Waiver Petition at 6-7.
[55] Taconic Comments on US West/Bell Atlantic Waiver Petitions at 2.
[56] AT&T Comments on New England/Pacific Waiver Petitions at 4-5.
[57] AAR Reply Comments on New England/Pacific Waiver Petitions at 2-4.
[58] ARINC Comments on BellSouth Waiver Petition at 2-4.
[59] NTCA Comments on New England/Pacific Waiver Petitions at 16.
[60] *See, e.g.*, BellSouth Reply Comments at 4-5; Pacific Reply Comments at 7.
[61] US West Reply Comments at 7.
[62] Southwestern Bell Comments on New England/Pacific Waiver Petitions at 4.

proposals can be addressed in the tariff review process.[63]

29. The petitioners also argue that their proposals are not optional alternative tariffs or experimental tariffs that must first be considered by the Joint Board or the state commissions. According to petitioners, an optional alternative tariff is limited to tariffs providing discounts to high-volume users through a flat surcharge on end users, and an experimental tariff encompasses only unified tariffs for intrastate and interstate access services.[64] Petitioners conclude that their proposals do not fall within either definition and thus need not be considered by the Joint Board.[65]

2. Basis for Granting Limited Waivers

30. Several commenters argue that we lack a sufficient basis for granting any waivers. GTE Sprint, for instance, argues that the petitioners have failed to meet the standard for granting a rule waiver, which allegedly requires consideration of special circumstances requiring departure from a general standard in a particular case.[66] ALC agrees, asserting that there is no evidence of a major bypass threat in 1986 and that the LECs have consistently underestimated demand in setting the CCL rate.[67] API/UTC argues that petitioners have failed to quantify the threat of bypass.[68] NTCA contents that no sound reasons have been advanced for departing from the current plan.[69] ARINC asserts that petitioners' unsubstantiated assertions of bypass are an insufficient basis for the granting of waivers.[70] Finally, Ad Hoc Users contend that no evidence has been presented to show that bypass problems are different in the various regions or that costs vary by region.[71]

31. Petitioners contend in response that a sufficient basis exists to grant waivers of our rules, and that opponents of the waivers have ignored the substantial record evidence of the existence of bypass.[72] They note that this Commission has recognized that

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[63] Southwestern Bell Comments on BellSouth Waiver Petition at 5.

[64] *See, e.g.*, BellSouth Reply Comments at 7; US West Reply Comments at 11-12.

[65] *See, e.g.*, BellSouth Reply Comments at 6-7.

[66] GTE Sprint Comments on US West/Bell Atlantic Waiver Petitions at 5.

[67] ALC Comments on New England/Pacific Waiver Petitions at 3.

[68] API/UTC Comments on BellSouth Waiver Petition at 5.

[69] NTCA Comments on New England/Pacific Waiver Petitions at 16.

[70] ARINC Comments on BellSouth Waiver Petition at 3.

[71] Ad Hoc Users Reply Comments on US West/Bell Atlantic Waiver Petitions at 9; Ad Hoc Users Comments on BellSouth Waiver Petition at 4.

[72] *See* BellSouth Reply Comments at 6. Specifically, BellSouth notes that the prevention of uneconomic bypass was one of the Commission's main goals in the *Access Charge Order* and that the Commission has made specific inquiry

service bypass exists and is growing. In addition, they allege that the recent implementation of SDN, Megacom, and Megacom 800 service increases the urgency of the need for alternatives to the CCLC.[73]

3. Consistency with This Commission's Long-Term Access Charge Plan

32. Several parties express concern that these proposals are inconsistent with the current transition to more rational access pricing. For instance, the National Telecommunications and Information Administration (NTIA) argues that these plans might derail the long-term plan and weaken exchange carrier support for increases in SLCs.[74] Similarly, AT&T urges us to deny the requested waivers and to decide instead either to move to full SLCs within three years or, at least, to adopt a plan that would shift a large portion of NTS costs to end users.[75] AT&T further contends that permitting implementation of these proposals would undermine telephone industry support for SLCs and would reduce the need for increases in SLCs.[76] In fact, AT&T expresses the fear that the New England plan may become permanent.[77] In the same vein, US Telecom and ALC both argue that these proposals may well delay or somehow reduce the probability of the implementation of the access charge plan.[78] MCI and SBS state that the exchange carriers should seek waivers to implement an immediate increase in SLCs rather than these proposals.[79] In their joint comments, the Central Committee of the American Petroleum Institute and the Utilities Telecommunications Council (API/UTC) argue that the Bell Atlantic proposal directly contravenes this Commission's policy of promoting cost-based pricing.[80]

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into the bypass threat and concluded, most prominently in the *Second Bypass Report* (*see infra* note 136), that bypass is already occurring and will continue to grow.

[73] *See, e.g.*, Pacific Reply Comments at 3. Pacific also cites our *Second Bypass Report* (*see infra* note 136), as support for the need for a waiver.

[74] NTIA Comments on US West/Bell Atlantic Waiver Petitions at 15–16. *See also* AT&T Reply Comments on New England/Pacific Waiver Petitions at 5 n. ***.

[75] AT&T Comments on US West/Bell Atlantic Waiver Petitions at 19; AT&T Reply Comments on US West/Bell Atlantic Waiver Petitions at 3, 13.

[76] AT&T Comments on BellSouth Waiver Petition at 5; AT&T Reply Comments on New England/Pacific Waiver Petitions at 5 n. ***.

[77] AT&T Reply Comments on New England/Pacific Waiver Petitions at 5 n. ***

[78] US Telecom Comments on US West/Bell Atlantic Waiver Petitions at 2; ALC Comments on BellSouth Waiver Petition at 14.

[79] MCI Comments on BellSouth Waiver Petition at 12–13; SBS Comments on US West/Bell Atlantic Waiver Petitions at 5.

[80] API/UTC Comments on US West/Bell Atlantic Waiver Petitions at 11.

33. Other commenters appear to approve the differences they perceive between the proposals and this Commission's long-term policies on NTS cost recovery. The National Association of Regulatory Utility Commissioners (NARUC), for instance, states its general position that diverse approaches to these cost recovery issues, which could reflect differences among regions, could function better than a single nationwide averaged plan, but advocates a specific "sunset date" that would provide twelve months of operational data for evaluation.[81] The staff of the Colorado Public Utilities Commission suggests that these proposals should be considered as permanent measures in lieu of SLCs.[82] The New York Department of Public Service states its preference for flat-rate IXC charges over SLCs and cities as a benefit their alleviation of the need for additional SLCs.[83] NTCA similarly argues that SLCs will not resolve the bypass problem and suggests that these proposals need not be temporary.[84]

34. For their part, the petitioners affirm, and reaffirm, that their proposals are intended only as interim proposals that would not diminish their support for the implementation of full SLCs.[85] Other LECs, including Ameritech, Southwestern Bell, Cincinnati Bell, United Telephone, and the United States Telephone Association (USTA), also declare their continued support of full, cost-based SLCs, while supporting the petitions as interim relief mechanisms.[86]

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[81] NARUC Comments on BellSouth Waiver Petition at 1. *See also* North Carolina Utilities Commission Comments on BellSouth Waiver Petition at 1.

[82] Colorado PUC Staff Reply Comments on US West/Bell Atlantic Waiver Petitions at i. In a similar vein, the Minnesota Department of Public Service recommends that we approve at least some of the proposals and evaluate their effects after a year or two. Minnesota Department of Public Service Reply Comments on US West/Bell Atlantic Waiver Petitions at 4.

[83] New York DPS Comments on US West/Bell Atlantic Waiver Petitions at 3; New York DPS Comments on BellSouth Waiver Petition at 3; New York DPS Comments on New England/Pacific Waiver Petitions at 6.

[84] NTCA Comments on BellSouth Waiver Petition at 3; NCTA Reply Comments on US West/Bell Atlantic Waiver Petitions at 2-3.

[85] US West Waiver Petition at 3-4; US West Reply Comments at 26; Bell Atlantic Waiver Petition at 3; Bell Atlantic Reply Comments at 3; Pacific Waiver Petition at 2; Pacific Reply Comments at 7; New England Waiver Petition at 4; New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 17-18; BellSouth Waiver Petition at 5; BellSouth Reply Comments at 4.

[86] Ameritech Comments on BellSouth Waiver Petition at 1-2; Southwestern Bell Comments on BellSouth Waiver Petition at 3-4; Cincinnati Bell Comments on US West/Bell Atlantic Waiver Petitions at 4; United Telephone Comments on US West/Bell Atlantic Waiver Petitions at 3; USTA Reply Comments on New England/Pacific Waiver Petitions at 5.

4. Nationwide Uniformity

35. An issue addressed by several parties is whether we should permit the divergence from the current nationwide uniformity with respect to NTS cost recovery that would result from implementation of any interim NTS plan. Some parties object to the approval of multiple regional proposals;[87] others argue that approval of *any* regional plan would disrupt the benefits of the current nationwide uniformity.[88] Whatever the extent of their opposition, the parties focus on four alleged benefits of uniformity: They argue that uniformity (i) greatly simplifies administrative burdens, (ii) prevents discrimination against regional IXCs, (iii) is critical to geographic toll rate averaging, and (iv) is essential to maintenance of the mandatory NTS cost recovery pool administered by NECA.

36. On the issue of the administrative benefits of nationwide uniformity, many commenters contend that granting waivers for several different interim methods of NTS cost recovery would significantly increase administrative difficulties for IXCs, users, and this Commission. A number of IXCs, for instance, contend that approval of several plans would significantly increase the administrative burdens of conducting their businesses.[89] API/UTC similarly contends that multiple plans would create numerous administrative problems for users.[90] NTIA warns that a "hodge-podge" of different schemes would result in "administrative nightmares."[91] MCI further agrees that approval of multiple plans would effectively halt federal regulation of LECs.[92]

37. Petitioners argue in response that flexibility is necessary now in light of the extended nature of the transition to SLCs and the rapidly changing market environment.[93] They maintain that their plans are consistent with the Commission's access charge goals.[94] New England argues as well that different plans would

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[87] *See, e.g.*, ALC Comments on BellSouth Waiver Petition at 7-8; MCI Comments on US West/Bell Atlantic Waiver Petitions at 26-28.

[88] *See, e.g.*, ALC Comments on US West/Bell Atlantic Waiver Petitions at 18-19.

[89] ALC Comments on BellSouth Waiver Petition at 7-8; MCI Comments on US West/Bell Atlantic Waiver Petitions at 6, 26; USTS Comments on US West/Bell Atlantic Waiver Petitions at 6-7.

[90] API/UTC Comments on BellSouth Waiver Petition at 6-7.

[91] NTIA Comments on US West/Bell Atlantic Waiver Petitions at 21.

[92] MCI Reply Comments on New England/Pacific Waiver Petitions at 7.

[93] *See* Bell Atlantic Reply Comments on US West/Bell Atlantic Waiver Petitions at 10; US West Reply Comments on US West/Bell Atlantic Waiver Petitions at 6; BellSouth Reply Comments on US West/Bell Atlantic Waiver Petitions at 2.

[94] *See* US West Reply Comments at 21-22; Bell Atlantic Reply Comments at 9-11; New England Waiver Petition at 2-7; Pacific Reply Comments at 2.

provide experience for evaluating whether uniformity continues to be viable in the long term.[95] USTA similarly contends that, even if we believe that we should eventually prescribe one uniform alternative NTS plan, these proposals should be implemented so as to provide valuable experience on which to base such a uniform plan.[96]

38. With respect to the treatment of regional IXCs, some parties raise concerns about whether the approval of different plans for different regions would unjustly discriminate against regional interexchange carriers. NTIA contends that approval of seven different plans could disadvantage regional carriers if they could not balance out their losses on a nationwide basis.[97] ALC argues more specifically that approval of any plan that recovered different amounts from originating and terminating access in one region than elsewhere would cause difficulties for regional carriers.[98] In the same vein, MCI argues that a call originating in a region maintaining the existing CCLC cost recovery mechanism and terminating in a region in which the exchange carrier is collecting higher costs on terminating access would end up paying a "double" recovery of access charges.[99] In response, US West argues that these objections are unreasonable because the IXCs are thereby seeking to operate in an artificial market in which everyone is equal throughout the nation.[100]

39. With respect to geographically averaged toll rates, a number of commenters argue that approval of multiple interim access charge plans would make it much more difficult for IXCs to maintain their services at reasonably uniform rates throughout the country.[101] Many similarly argue that approval of multiple plans, with their differing structures for NTS costs, would increase the incentive for nationwide toll deaveraging.[102] Some commenters state that this incentive is greatest with proposals that would collect different levels of NTS costs on the originating

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[95] New England Reply Comments at 2-3.

[96] USTA Reply Comments on New England/Pacific Waiver Petitions at 4.

[97] NTIA Comments on US West/Bell Atlantic Waiver Petitions at 21.

[98] ALC Comments on US West/Bell Atlantic Waiver Petitions at 18-19.

[99] MCI Comments on US West/Bell Atlantic Waiver Petitions at 28.

[100] US West Reply Comments at 41-42.

[101] ALC Comments on BellSouth Waiver Petition at 7-8, 11; ALC Comments on US West/Bell Atlantic Waiver Petitions at 5; API/UTC Comments on BellSouth Waiver Petition at 6-7; SBS Comments on US West/Bell Atlantic Waiver Petitions at 6.

[102] MCI Reply Comments on US West/Bell Atlantic Waiver Petitions at 2-3; ALC Comments on BellSouth Waiver Petition at 11; GTE Sprint Comments on BellSouth Waiver Petition at 7, n.5; NTCA Comments on BellSouth Waiver Petition at 7-8.

and terminating ends than the current CCLC.[103] This is interpreted by some as prejudicing the interests of the rural community and this Commission's goal of maintaining universal service.[104] NARUC advocates that we take no action that would have a negative effect on nationwide averaged toll rates.[105] In response, Pacific denies that toll rate deaveraging will occur with the approval of multiple plans, noting that toll rates are now averaged even though many of the IXCs' costs, including traffic-sensitive (TS) costs, differ by region.[106]

5. Effects on the NECA Pool

40. Several commenters oppose the petitions on the basis of their alleged effects on the operation of the mandatory pool of NTS costs and revenues administered by NECA. Some commenters argue that the implementation of any interim NTS plan would jeopardize the pool. Several commenters express concern in addition about how individual interim NTS plans would interrelate with the pool.

41. On the first point, some commenters argue that the petitions jeopardize the pool by their effects on nationwide uniformity in NTS cost recovery. Some, in fact, contend that approval of *any* separate regional plan is inappropriate. For instance, NTCA argues that permitting any exchange-carrier-specific CCL charges would distort the very concept of a nationwide telecommunications network, would call into question the entire process of NECA pooling, and could be a step toward abandonment of small and rural exchange carriers and their subscribers and the goal of universal service.[107] It advocates permitting NECA to file a nationally uniform flat-rate carrier access charge to recover interstate NTS costs from IXCs.[108] Other non-petitioning LECs similarly contend that approval of several different interim NTS proposals would seriously compromise the

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[103] ALC Comments on New England/Pacific Waiver Petitions at 11; MCI Comments on Pacific Waiver Petition at 3-5.

[104] NTCA Reply Comments on US West/Bell Atlantic Waiver Petitions at 1; NTCA Comments on BellSouth Waiver Petition at 8; ARINC Reply Comments on US West/Bell Atlantic Waiver Petitions at 5.

[105] NARUC Comments on BellSouth Waiver Petition at 2; North Carolina Utilities Commission Comments on BellSouth Waiver Petition at 2.

[106] Pacific Bell Reply Comments at 18; Pacific Comments on US West/Bell Atlantic Waiver Petitions at 3; BellSouth Reply Comments at 15-16.

[107] NTCA Comments on BellSouth Waiver Petition at 6-7, 8-9, 12; NTCA Comments on New England/Pacific Waiver Petitions at 9.

[108] NTCA Comments on US West/Bell Atlantic Waiver Petitions at 9; NTCA Comments on BellSouth Waiver Petition at 2.

NECA pool.[109] NECA argues that authorization of multiple plans may add greatly to the complexity and costs of NTS pooling and that, to keep the mandatory NTS pool whole, exchange carriers implementing interim plans would have to continue to maintain complete and accurate usage records in auditable form.[110]

42. On the second point, several commenters suggest that we should adopt general or specific guidelines to govern the relationship of any interim NTS plans with the NECA pool. The petitioners and commenters agree in principle that an interim NTS plan should not be the vehicle for modifying the operation of the NECA pool. This general principle is stated somewhat differently by different commenters without any clear difference in meaning: some contend that the plans should be "transparent" to the pool;[111] others argue that any such plans should not adversely affect the NECA pool, at least not without prior referral to the Joint Board.[112] Petitioners are in agreement with this basic principle and state that their proposals do not adversely affect the NECA pool or its members.[113]

43. Disagreement does exist, however, about how best to achieve this objective. A number of parties advocate that we require LECs implementing interim NTS plans to settle with the pool as though there were no plans. For instance, NECA advocates that we require that existing pool relationships be maintained[114] by imposing five specific conditions on LECs implementing interim NTS plans, including the condition that they settle with the pool by paying an amount equal to the nationwide NECA CCL rate times the number of actual access

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[109] Shenandoah Telephone Comments on US West/Bell Atlantic Waiver Petitions at 2, n.4; Taconic Comments on BellSouth Waiver Petition at 3.

[110] NECA Comments on US West/Bell Atlantic Waiver Petitions at 2. *See also* NTCA Comments on US West/Bell Atlantic Waiver Petitions at 8.

[111] *See* Cincinnati Bell Comments on US West/Bell Atlantic Waiver Petitions at 2.

[112] NARUC Reply Comments on US West/Bell Atlantic Waiver Petitions at 2; GTE Telephone Reply Comments on US West/Bell Atlantic Waiver Petitions at 1; North Carolina Utilities Commission Comments on BellSouth Waiver Petition at 2; Contel Comments on US West/Bell Atlantic Waiver Petitions at 2; USTA Comments on US West/Bell Atlantic Waiver Petitions at 7; USTA Reply Comments on New England/Pacific Waiver Petitions at 2; USTA Comments on BellSouth Waiver Petition at 3.

[113] US West Reply Comments at 29-30; Bell Atlantic Reply Comments at 11; New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 33-37; Pacific Reply Comments at 13; Pacific Comments on BellSouth Waiver Petition at 2; BellSouth Reply Comments at 16-17. *See also* Southwestern Bell Comments on BellSouth Waiver Petition at 3-4.

[114] NECA Reply Comments on US West/Bell Atlantic Waiver Petitions at 3; NECA Comments on New England/Pacific Waiver Petitions at 6; NECA Comments on BellSouth Waiver Petition at 2.

minutes in their areas.[115] US West, Bell Atlantic, and Pacific all propose to take this approach in their relationships with the NECA pool.[116]

44. Other parties, expressing concern about the unknown risks to which interim NTS plan would expose the NECA pool, advocate that the pool be insulated from those risks. GTE Telephone, for instance, argues that the NECA NTS pool should be indemnified from the effects of any interim tariffs by requiring the LECs involved to base their monthly commitment to the NTS pool on the monthly forecast minutes-of-use and to index their forecasts each year so as to prevent them from reflecting demand responses in previous years to the interim NTS plans themselves. In addition, according to GTE Telephone, the LECs should satisfy their NECA pool obligations prior to covering their own NTS costs and should not be permitted to settle with the pool for their study area NTS costs.[117] Taconic likewise notes that these interim NTS proposals could lead to a reduction in interstate access minutes.[118] If settlements with the NECA pool were based on actual MOU, the NECA pool (and its other members) would lose revenues. Therefore, Taconic argues, we should set guidelines maintaining the level of carrier contribution to the pool and insulating other companies in the pool from pricing distortions

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[115] NECA Reply Comments on US West/Bell Atlantic Waiver Petitions at 3. NECA's five suggested conditions are as follows:

1. LECs should continue to provide the cost demand forecast data needed to develop CCLC rates for a uniform pool rate of return.

2. For purposes of settlements, LECs should report revenues for the current period equal to the NECA CCL rate times the actual usage amounts to which the CCL rate would apply.

3. LECs should continue to report for the current period all relevant Part 67 and Part 69 costs as the basis for settlements.

4. LECS should continue to maintain all underlying records necessary to review, audit, and verify their NECA reporting, including the existing usage-based billing systems.

5. LECS should continue to participate in common line settlements based on a uniform common line pool rate of return.

[116] US West argues that this method is appropriate because its plan does not affect the risk that its actual access minutes will be fewer than forecast. US West Reply Comments at 29–30. Bell Atlantic originally proposed to remit to the pool on the basis of forecast minutes of use, but changed to actual minutes of use in response to comments. Bell Atlantic Reply Comments on 11.

[117] GTE Telephone Comments on BellSouth Waiver Petition at 5; GTE Telephone Comments on New England/Pacific Waiver Petitions at 2–4; GTE Telephone Comments on US West/Bell Atlantic Waiver Petitions at 6.

[118] Taconic Telephone Corp., Granite State Telephone, Waitsfield-Fayston Telephone Company, Dobson Telephone Company, Inc., and Fort Bend Telephone Company (Taconic) Comments on BellSouth Waiver Petition at 3–4.

caused by interim NTS plans.[119] OPASTCO is in substantial accord with Taconic, arguing that the actual impact of these proposed changes is unknown and that other exchange carriers in the pool "must not be forced to share in the risks voluntarily incurred by those carriers proposing waivers."[120] New England and BellSouth take this approach in their proposals.[121]

45. Two non-petitioning commenters in addition to the petitioners, United Telephone and Southern New England Telephone (SNET), argue that LECs implementing interim NTS plans should be given some flexibility in determining their relationship with the NECA pool. United Telephone challenges the whole notion that LEC-specific NTS cost recovery plans can be made "transparent" to the NECA pool and suggests that we give serious consideration to defining standards and limitations concerning the impact of these plans on the pool.[122] It appears to urge that those LECs be permitted to satisfy their NECA obligations in any of three ways as an experiment, during which time the effects of the alternative methods can be studied. The options United suggests are settlement with the pool on the basis of (1) actual minutes of use, (2) minutes of use as forecasted in their July, 1985, access tariff filings, or (3) actual revenues billed and received from their IXCs.[123] Similarly, SNET states that, although it believes settlement based on forecast minutes of use is preferable to settlement based on actual minutes of use, we should not require that settlement be made by one method rather than the other.[124]

B. Discussion

46. After examination of the record and analysis of the important policy issues raised by the petitions, we have concluded

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[119] Taconic Reply Comments on US West/Bell Atlantic Waiver Petitions at 4-5; Taconic Comments on BellSouth Waiver Petition at 3-4.

[120] Organization for the Protection of Advancement of Small Telephone Companies (OPASTCO) Comments on BellSouth Waiver Petition at 2-3.

[121] New England Waiver Petition at 8; BellSouth Reply Comments at 16-17. It is conceivable that a LEC would propose to remit to the pool based on access minutes as forecast at the beginning of each year, without any adjustment for the effects of the plan itself. Under this method, other pool members would be protected during the first year from any unanticipated downturns in demand due to the interim NTS plan. For following years, however, those declines would be incorporated into the forecasts, raising the nationwide NECA CCL rate and thereby affecting all members of the pool.

[122] United Telephone Reply Comments on US West/Bell Atlantic Waiver Petitions at 3-4.

[123] United Telephone Comments on New England/Pacific Waiver Petitions at 5-6; United Telephone Comments on BellSouth Waiver Petition at 2-3.

[124] SNET Comments on US West/Bell Atlantic Waiver Petitions at 7.

that we should allow limited waivers of our access charge rules to provide LECs with some flexibility in recovering their interstate NTS costs. Nevertheless, we have also concluded that we cannot permit implementation of the interim NTS proposals as filed. We are persuaded by the comments that these proposals, while promising significant benefits, also have the potential of causing serious costs unless cabined by guidelines. The guidelines established in this Order are intended to ensure that the implementation of any interim NTS plan does not jeopardize the eventual achievement of the goals of our access charge plan, certain benefits of national uniformity in CCL cost recovery, or the integrity of the NECA NTS pooling process. We explain these conclusions and set forth the corresponding guidelines below.

1. Use of the Waiver Procedure

47. We conclude that use of the waiver procedure is appropriate under the circumstances presented by these petitions and that we should consider these waiver petitions together to ensure uniform treatment. We also conclude that, because none of the interim plans is an "optional alternative tariff" or "experimental tariff," we need not require petitioners to submit their proposals to their state commissions or the Joint Board.

48. It is well established that we have the authority to grant waivers of our general rules in certain circumstances.[125] The waiver process allows us to "maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility."[126] In deciding whether or not to grant specific waiver requests, we must "take into account considerations of hardship, equity, or more effective implementation of overall policy" in our broader quest for regulation in the "public interest."[127]

49. In the context of NTS cost recovery, we have repeatedly stated that our objective has been to reduce the heavy costs imposed on the telecommunications network by an uneconomic system of pricing NTS costs. As we have explained elsewhere in detail, these costs are manifest in (1) discrimination between cost recovery methods for subscriber loop (*i.e.*, common line) and

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[125] *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). Our rules provide that any provision may be waived "by the Commission on its own motion or on a petition if good cause therefor is shown." 47 C.F.R. § 1.3 (1985).

[126] *WAIT Radio* at 1159.

[127] *Id.*

private line loop; (2) the loss in economic efficiencies from the recovery of fixed costs through usage charges; (3) the danger of uneconomic bypass of the local public switched network; and (4) the preservation of universal service.[128] The overarching policy issue presented by these waiver petitions is one expressly appropriate for waiver petitions: whether effective implementation of the underlying goals of our access charge rules for NTS cost recovery would be frustrated unless we permit LECs some flexibility in the collection of their CCL revenue requirement.

50. Petitioning parties do not seek, nor will we condone, "evisceration" of our Part 69 rules through waivers. As will become clear below, the type of waiver we are prepared to grant would not affect the existing CCL cost recovery mechanism for terminating access. Furthermore, pursuant to the guidelines we are establishing, any waiver will be of limited scope, and the tariff implementing such a waiver will be of limited duration.

51. It also is clear, contrary to the claims of several commenters, that we need not conduct a rulemaking proceeding to consider all relevant issues in an efficient and effective manner. We have sought out comment by interested parties on these petitions through lengthy pleading cycles and have received and analyzed an extensive record.[129] Furthermore, we are following the suggestions of a number of parties and are considering the petitions together in one comprehensive Order, rather than in individual orders. Thus, in many respects, we have employed procedures comparable to those required for informal rulemaking. As we stated in a previous waiver proceeding:

> [W]e have gone to great length to ensure that the procedures we have employed are fair; that the interested public would have a fair opportunity to be heard; and that the respective views of the petitioners, their supporters, and their opponents, would be fully appreciated and addressed in our resolution of their requests. The Administrative Procedure Act does not prescribe a specific procedural format for informal adjudicatory procedures such as this waiver proceeding. It is the responsibility of the agency to employ procedures which ensure creation of an adequate record to support the results it reaches, and we have done so here.[130]

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[128] *See supra* note 15. *See also Recommended Decision* at para. 6; *Access Charge Order* at para. 26.

[129] Also, because LECs wishing to implement interim NTS plans pursuant to these guidelines will still have to submit both a waiver petition and a tariff, interested parties will have two additional opportunities to address the merits of particular interim NTS plans before they are implemented.

[130] Waiver of Section 64.702, Memorandum Opinion and Order, 100 FCC 2d 1057, para. 35 (1985).

52. We have carefully crafted the guidelines set out in this Order to reflect the concerns raised by commenters, with the goal of preserving the essential elements of our Part 69 rules while still providing LECs the opportunity to seek temporary relief where they believe it is necessary. We have thus combined the opportunity for notice and comment afforded in rulemaking proceedings, and the ability to allow individualized treatment for differing circumstances through the waiver process.

53. Finally, we find that referral to the Joint Board or to state commissions is not required. We stand ready to refer to the Joint Board all optional alternative tariffs and experimental tariffs, "*i.e.*, those that involve additional flat rate recovery of NTS costs from subscribers, require modification of the NTS pooling requirements contained in Part 69 of the Commission's rules, or require changes in jurisdictional separations."[131] In fact, we have followed this approach with a Rochester Telephone Company waiver petition seeking to increase the residential and single-line business SLC above $2.00 in its area in order to decrease its CCL revenue requirement.[132]

2. Basis For Granting Limited Waivers

54. Our conclusion that we should provide for limited waivers of our NTS cost recovery rules is based on a number of factors. First, the unanticipated delay in the development of a permanent plan for pricing NTS costs has increased the dangers of efficiency losses and uneconomic bypass. Originally, our plan would have collected half of interstate NTS costs directly from end users in 1984 and ended the inefficient loading of NTS costs onto toll rates within five years.[133] Serious concerns about the possible effect of that transition on universal service, small telephone companies, and small businesses led us to reevaluate that plan. After the advent of a second dollar in the nationwide SLC for residential and single-line business customers on June 1, 1986, we

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[131] MTS/WATS Market Structure and Amendment of Part 67, Memorandum Opinion and Order, CC Docket Nos. 78-72 & 80-286, FCC 86-56, para. 14, n.30 (released Jan. 30, 1986).

[132] MTS/WATS Market Structure and Amendment of Part 67, Order Inviting Comments, CC Docket Nos. 78-72 & 80-286, Mimeo No. 2736 (released Feb. 21, 1986). For the same reasons, implementation of the proposal advanced in comments by the Shenandoah Telephone Company would require prior consideration by the Joint Board. That proposal seeks to increase SLCs above $2.00 in order to decrease the proportion of interstate NTS costs being recovered from IXCs to the level of interstate Subscriber Line Usage (SLU). *See* Shenandoah Comments on US West/Bell Atlantic Waiver Petitions at 3-4 & Attachment.

[133] *See supra* paras. 3-4.

plan to collect only about 30% of NTS costs through SLCs. The SLC will remain frozen until completion of a Joint Board proceeding to examine the effect of the SLC and any alternative or experimental tariffs on universal service, bypass, economic efficiency, and interexchange competition.[134] This delay has resulted in serious efficiency losses in the interstate network because interstate toll rates are still much higher than economically justified as the result of the significant continued loading of NTS costs into such toll rates.

55. Meanwhile, there is an increasing threat to the public switched network from various forms of uneconomic bypass — that is, bypass of the local loop for interstate calling in circumstances in which only the uneconomic inclusion of NTS costs on a usage-sensitive basis in interstate toll rates makes the bypass alternative less expensive.[135] As part of the transition, the Commission staff has conducted two studies on the existence of uneconomic bypass, which have both concluded that such bypass is occurring and will continue to grow.[136] We have also noted that once facilities bypass connections are made with the IXC, they are likely to be irreversible.[137] AT&T has confirmed that it believes that a significant number of its end users are looking to bypass the local public switched network and that it will offer the services to satisfy that desire rather than lose those customers to IXC competitors.[138]

56. In addition to facilities bypass, there continue to be increased opportunities for service bypass. Service bypass occurs when an end user connects with the IXC through LEC-provided special access lines, which are billed on a flat-rate basis and are not subject to the usage-based CCLC. Thus, a high-volume user

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[134] *See supra* para. 7.

[135] See *Access Charge Order* at para. 154.

[136] *See Access Charge Order* at App. F ("Status Report on Near-Term Local Bypass Developments"); FCC, Common Carrier Bureau, Bypass of the Public Switched Network (Dec. 19, 1984) (hereinafter *Second Bypass Report*); *Bypass Order, supra* note 19 (adopting *Second Bypass Report*). *See also* G. Brock, *Bypass of the Local Exchange: a Quantitative Assessment*, Office of Plans and Policy Working Paper Series No. 12 (September 1984); Bell Communications Research, Inc., *The Impact of Access Charges on Bypass and Universal Telephone Service* (September 1984).

[137] *See Access Charge Order* at para. 32.

[138] *See, e.g., AT&T Plans to Bypass 7 Bell Units*, The Washington Post, Oct. 27, 1985, at 1, col. 1. The decisions of Merrill Lynch, Teleport, and AT&T to construct private facilities in heart of New York City furnishes one dramatic example that bypass is occurring. This area contains approximately 85% of New York Telephone's top 100 revenue producing customers. New England Waiver Petition at 5 n. **. *See also Second Bypass Report* at 23, n.43.

may in many cases find special access connections considerably less expensive than switched access connections even though their true economic costs may be greater.[139] US West notes that it has received significant orders for DS1 circuits that provide multiplexing to voice level that would provide bypass ability.[140] Many such circuits would directly connect IXCs to end users and resale carriers that traditionally have been high-volume users of the public switched network. Other such circuits would connect AT&T with US West end offices serving large concentrations of high-volume WATS users. Similarly, Bell Atlantic states that demand in its territories (as reflected by billed revenues) for DDS circuits, which are high-capacity facilities that may connect end users directly to IXC networks, rose by nearly 40%.[141]

57. In late 1985, AT&T's Megacom, Megacom 800, and Software Defined Network (SDN) services became available. It is anticipated that end users subscribing to these services, which are switched services originating at AT&T's point-of-presense (POP), will reach the POP primarily through private facilities or through special access connections. The OCCs have been providing similar bypass services to end users as well. As we said at the time we allowed those AT&T tariffs to take effect, the proper response to such bypass alternatives is not to prohibit the provision of the services, but to take steps to mitigate the effects of the current uneconomic mechanism for recovering interstate NTS costs.[142]

58. We have also recognized from the beginning of our access charge plan that a degree of carrier flexibility is important to the success of the transition. In the *Access Charge Order*, we provided for a minimum and maxium End User Common Line Charge and allowed the LECs some flexibility concerning the best structure for access charges in their region.[143] We believed that by giving carriers some discretion, we would enable them to respond quickly to any bypass threat where it is a problem while allowing for a more gradual transition where it is not.[144] The need for flexibility was reaffirmed by our adoption of the Joint Board recommendation for optional alternative and experimental tar-

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[139] *Bypass Order* at para. 2.

[140] US West Waiver Petition at 7.

[141] Bell Atlantic Waiver Petition at 12.

[142] *See* AT&T Communications, Memorandum Opinion and Order, CC Docket No. 85-326 and Transmittal Nos. 434 and 435, FCC 85-584, para. 15 (released Nov. 7, 1985). AT&T Communications, Memorandum Opinion and Order, CC Docket No. 85-203 and Transmittal Nos. 321 and 991, FCC 85-583, para. 22 (released Nov. 7, 1985).

[143] *See Access Charge Order* at paras. 169-94.

[144] *Id.* at para. 5.

iffs.[145] It has become apparent, however, in these rapidly evolving circumstances, that those procedures may not be providing sufficient flexibility to the LECs to assure that our overall objectives in NTS cost recovery will be achieved to the maximum extent possible. We note that, while we have found uneconomic bypass to be a material concern requiring a national response, we have also long recognized that the intensity of the problem, particularly in the short term, varies somewhat from region to region. As the *Second Bypass Report* noted, the potential for uneconomic bypass varies geographically with the existence of concentration of use.[146] The optional alternative and experimental tariff procedures were established to allow responses to localized bypass difficulties.[147] Thus, the regional nature of bypass and the propriety of permitting individual LECs to fashion NTS recovery plans in light of the particular circumstances prevailing to their regions have, at least in some respects, been established.

59. Thus, we believe that a sufficient showing has been made to permit the possibility of granting some waivers to our present access charge rules for CCL cost recovery. Some flexibility for the LECs is justified in the current circumstances to mitigate the effects of the continued uneconomic recovery of NTS costs of the public switched network.

3. Consistency with This Commission's Long-Term Access Charge Plan

60. We do not believe that permitting LECs some interim flexibility under these circumstances limits our ability to devise a permanent NTS cost recovery plan. All the petitioners have emphasized that their proposals are interim in nature and have advocated continuing the transition to more rational economic NTS pricing. They regard that transition as necessary to eliminate the current pricing distortions that burden the nation's telecommunications network with gross inefficiencies and result in bypass arrangements that would not exist if high-volume end users only had to pay the costs associated with their presence on the network. It is our firm intention as well that any interim NTS plan remain in effect only for a limited period of time. Therefore, we will require that any tariff proposing to modify a LEC's method of collecting its interstate NTS revenue requirement be filed with an expiration date no later than one year after its effective date.

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[145] *See Optional Alternative Tariff Order, supra* note 22.
[146] *Second Bypass Report* at 23.
[147] *See Optional Alternative Tariff Order* at para. 32.

In the meantime, the Joint Board will conduct its proceeding on the effects of the steps taken thus far toward more rational pricing of NTS costs and formulate its recommendations on additional steps the Commission should take in the near future.

4. Nationwide Uniformity

61. We conclude for a number of reasons that LEC flexibility in the collection of the CCL revenue requirement must be limited in certain respects in order to preserve the benefits of national uniformity in NTS cost recovery. First, uniformity does provide real savings in administrative costs for users, IXCs, and regulators that must be weighed in the balance of decision making. Such costs could well be drastically affected if we permitted LECs an unlimited amount of flexibility in designing interim rate structures. The preservation of the principle of national uniformity also serves as a reminder that uneconomic bypass is in many respects a national problem requiring a national solution.[148] Undue proliferation of different methods of recovering a significant portion of the costs of local exchange plant used in making interstate telephone calls through unlimited LEC flexibility would lead to heavy administrative costs jeopardizing these benefits. Petitioners' specific showings do not justify an unlimited number of regional variations in NTS rate structures.

62. Second, unlimited LEC flexibility would also raise serious problems of discrimination against regional IXCs, who may originate all their traffic in one area, but terminate it all across the country. Because some of the NTS proposals would have collected different proportions of total NTS costs from originating and terminating access minutes, such regional IXCs would find themselves having to pay a greater or lesser amount in NTS charges solely because of their geographic location and their less than ubiquitous presence.

63. To preserve the benefits of uniform NTS pricing system, we establish the following guidelines to limit the scope of LEC flexibility. Under these guidelines, we do not expect that the potential for balkanization raised in the comments will actually materialize.[149] First, we do not intend to waive our rules that provide for collection of a terminating CCL revenue requirement

[148] As explained in our *Second Bypass Report*, because of the NECA pool, bypass in New York City results in increased rates throughout the entire country. *See Second Bypass Report* at 23.

[149] These guidelines are intended to set forth the conditions that any interim NTS proposal must meet. Each particular petition will have to be examined

according to a nationally uniform, usage-sensitive CCLC. LECs will thus have flexibility only with respect to the collection of the originating CCL revenue requirement. Our recent decision to collect proportionately less of the NTS revenue requirement from originating access than from terminating access provides further protection against significant balkanization.[150]

64. As another method to preserve some of the benefits of national uniformity, we are prepared, after review of the five proposals submitted, to approve waivers for interim NTS plans that comply with either of two particular models — an IXC capacity charge model, which might include surcharges on special access lines, including WATS lines; or a direct end user charge model.[151] We describe these two models in more detail below during our analysis of the particular proposals set forth in the five petitions under review.[152]

5. Effects on the NECA Pool

65. We agree with the consensus of the commenters that any interim NTS plan must not significantly affect the current operations of the NECA pool of NTS costs and revenues.[153]

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according to all the circumstances, including that proposal's likely impact on bypass in the relevant region and on full and fair competition in the interexchange market.

[150] In the *WATS Access Charge Order*, we froze the CCLC at 4.33 cents per minute for all terminating minutes on services with two open ends and all open end minutes on services with one open end. *See WATS Access Charge Order* at paras. 50–54. With the various changes to be implemented on June 1, 1986, we expect that the CCLC for the remaining switched access minutes will be less than 4.33 cents/minute.

[151] LECs may, of course, submit optional alternative tariff or experimental tariff proposals through their state commissions or the Joint Board according to previously established procedures. Our guidelines are not intended to limit the kind of interim NTS plans approved through those procedures. *See, e.g.*, Rochester Telephone Waiver Petition (filed Jan. 16, 1986).

We also do not mean to preclude our approval of other interim NTS plans, but our review of them will be subject to the same concerns underlying the guidelines set forth in this Order. To the extent other plans diverge from the guidelines, petitioners will be expected to demonstrate why their proposals adequately respond to these underlying concerns or why these concerns are not applicable to their proposals.

[152] We, of course, will permit implementation of interim NTS plans only after careful review of the underlying submissions. We anticipate that such review will be consistent with our ability to continue to evaluate other tariffs on a timely basis.

[153] This requirement, together with that establishing a non-waivable, nationally uniform CCL rate for terminating access, will help ensure that no interim NTS plan jeopardizes the current system of geographically averaged toll rates. In these circumstances, we believe that the guidelines we establish here should be sufficient to avoid disintegration of geographically averaged toll rates, espe-

Accordingly, we would not approve waiver proposals that would change the methodology of NTS cost recovery pooling. For instance, Bell Atlantic and the New Jersey Board of Public Utilities have both filed Petitions for Rulemaking asking us to amend Part 69 of our rules so as to modify, or eliminate, the NECA pool.[154] Their proposals do seek to alter in a fundamental fashion the obligations of LECs to the NECA pool and could not be implemented pursuant to waiver.

66. Commenters in this proceeding present two principal methods for protecting the NECA pool: LECs implementing interim NTS plans could (1) remit to the pool based on the CCLC and the level of access minutes forecast absent implemention of their plans; or (2) remit to the pool based on the CCLC rate and actual access minutes experienced under their plans. Some commenters suggest that the LECs implementing the plans be allowed to select their method. In principle, it would appear that the first approach, which, if properly implemented, would insulate the pool from the risks of interim NTS plans, would be the preferable course of action.[155] Nevertheless, the practical difficulties of determining the levels of access minutes absent implementation of interim NTS plans are not significant.[156] Thus, we do not believe that we can endorse one method for safeguarding the operation of the NECA pool for all interim NTS plans. We will consider below the particular guidelines that should apply to our two interim NTS plan models in order to prevent any significant effect on the NECA pool.

V. Issues Raised Concerning the Particular Proposals

67. As discussed in Part IV, we have decided to place certain general limits on interim NTS plans. In this Part, we examine in some detail the four flat-rate charge proposals advanced and the direct end user charge proposal of New England in order to

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cially since geographic deaveraging of AT&T's toll rates will require at least a tacit Commission finding that such deaveraging will serve the public interest. We have indicated that we will examine all the possible consequences before making such a finding. *See* MTS/WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177, para. 66 (1980).

[154] Petitions for Rulemaking filed by Bell Atlantic and New Jersey Board of Public Utilities, RM-5205 (filed Oct. 28, 1985 and Nov. 7, 1985). Because these petitions contemplate modification of the NTS pooling requirements contained in Part 69 of our rules, we intend to refer them to the Federal-State Joint Board.

[155] *See Recommended Decision* at para. 37.

[156] *See Optional Alternative Tariff Order* at paras. 20–21.

establish more specific guidelines for acceptable interim NTS plans.

A. IXC Flat-Rate Charge Proposals

68. Four of the specific proposals before us would recover a portion of NTS costs by means of flat-rate charges imposed upon IXCs. These flat-rate charges are all based, in one way or another, on the IXCs' capacities. US West would allocate NTS costs to IXCs based on their proportion of presubscribed "1+" lines. Bell Atlantic would apportion NTS costs among IXCs on the basis of their proportionate shares of "access facility connections." Pacific proposes to recover NTS costs through (i) a flat monthly charge on special access lines assessed on a voice-grade-equivalent capacity basis, and (ii) an allocation of remaining NTS costs among IXCs based on a historical measure of their relative shares of total switched access minutes of use. BellSouth proposes to impose a WATS Access Line Charge on each WATS and 800 Service access line and to allocate the remaining NTS costs to IXCs according to their proportionate shares of ordered and installed Busy Hour Minutes of Capacity (BHMC).

1. Comments

a. Effects on Allocation of Risks Between LECs and IXCs

69. A major focus on the comments on the various proposed flat-rate IXC charges is the shift of the risk of non-recovery of NTS costs, whether due to economic conditions or to other factors, from the LECs to the IXCs. For example, RCA argues that Bell Atlantic's flat-rate pricing scheme would transfer virtually all the risk of providing exchange access services from the LEC to its IXC customers.[157] RCA concludes that the risk-shifting contemplated by the flat-rate proposals would erode the incentive to provide quality service.[158] AT&T also contends that the flat-rate proposals generally would leave the IXCs vulnerable to any income deficiencies that might occur while providing the LECs a guaranteed return on their investment.[159] Similarly, Chicago Fiber Optic asserts that the proposals would substantially increase the risk borne by the IXCs. It therefore argues that, if this transfer of the risk is permitted, we should

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[157] RCA Comments on US West/Bell Atlantic Waiver Petitions at 9.

[158] *Id.*

[159] AT&T Comments on US West/Bell Atlantic Waiver Petitions at 4; AT&T Comments on New England/Pacific Waiver Petitions at 19–20.

consider making appropriate adjustments to the LECs' allowable rate of return.[160]

70. Pacific responds that its proposal does not unduly shift the burden of recovering NTS costs to the IXCs because the Commission's rules already allocate a fixed portion of the NTS cost burden to the IXCs; its petition merely seeks to recover this amount on a flat-rate, rather than usage-sensitive, basis. Pacific further argues that the IXCs would benefit under its plan because their access charges would be capped for a year. This would allow the IXCs a greater degree of certainty in facilities planning, according to Pacific.[161] The flat-rate proposals receive the support of certain state representatives in part because this method of cost recovery would remove certain risks from the LECs and ensure that they actually recovered the NTS revenue requirement established by the Commission. The resulting increased stability, it is argued, would help to preserve universal service and the LECs' financial integrity.[162]

b. Effects on Full and Fair Interexchange Competition

71. The commenters also debate the effect that various flat-rate proposals will have on competition among IXCs. We shall first summarize those arguments generally addressing the effects of interexchange competition of capacity-based plans that allocate costs among IXCs annually. We then summarize those arguments concerning the impact of these specific proposals on the existing OCC discount. We finally present those arguments focusing on the other effects of particular attributes of these proposals on full and fair interexchange competition and other miscellaneous arguments on this issue.

72. Generally, the OCCs take the view that capacity allocators will penalize smaller carriers because they have lower levels of traffic loading. They essentially argue that these plans will favor AT&T because, as a result of the inherent efficiencies of larger trunk groups, it is able to transport a greater quantity of traffic per access line at a given grade of service than its smaller competitors.[163] GTE Sprint also argues that AT&T would acheive

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[160]Chicago Fiber Optic Comments on US West/Bell Atlantic Waiver Petitions at 4–5.

[161]Pacific Reply Comments at 19.

[162]Colorado Consumer Counsel, *et al.*, Comments on US West/Bell Atlantic Waiver Petitions at 18.

[163] *See, e.g.*, GTE Sprint Comments on US West/Bell Atlantic Waiver Petitions at 11; GTE Sprint Comments on New England/Pacific Waiver Petitions at 10; GTE Sprint Comments on BellSouth Waiver Petition at 11.

the maximum benefit from capacity allocation plans because of its large trunk groups and its ability to forecast end office traffic volumes with relative accuracy.[164] ALC contends that plans such as Bell Atlantic's would result in a dramatic increase in the proportion of NTS costs borne by the smaller OCCs that cannot achieve the efficiencies of scale as larger carriers.[165] Moreover, in addition to shifting costs from high-volume to low-volume carriers, the capacity allocation plans could shift the NTS cost burden among services (*i.e.*, from toll to FX/ONAL due to the lower per line traffic volume of the latter).[166]

73. AT&T, on the other hand, argues that it would be penalized by the BOC flat-rate proposals. It asserts that the annual capacity-based allocation of NTS costs proposed by these plans would discriminate against IXCs with a declining market share,[167] while at the same time giving IXCs entering the market a "free ride" for up to a year.[168] Under Pacific's proposal, for example, the allocation of NTS costs to IXCs would be based upon the carrier's historical usage data for the three months prior to the cost allocation.

74. Some commenters defend the flat-rate proposals generally on the issue of their effects on interexchange competitions. For example, in joint comments, the Florida Office of Public Counsel, Georgia Consumers Utility Counsel, the District of Columbia Office of Peoples Counsel, and the National Association of State Utility Consumer Advocates contend that the fact that both AT&T and the OCCs believe that the Bell Atlantic plan discriminates against them reflects the plan's balanced approach.[169] The Minnesota Attorney General asserts that the flat rate proposals recognize the relationship between the level of usage and a carrier's ability to generate the revenues needed to pay NTS costs, thus furthering the goals of network efficiency and nondiscrimination.[170] Pacific also defends its plan, asserting that its proposed cost allocator would not discriminate against carriers whose usage is declining. Pacific contends that increases of reductions in a carrier's usage would have only a small impact on

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[164] GTE Sprint Comments on US West/Bell Atlantic Waiver Petitions at 13.
[165] ALC Comments on US West/Bell Atlantic Waiver Petitions at 11.
[166] New York DPS Comments on BellSouth Waiver Petition at 3-4.
[167] AT&T Comments on BellSouth Waiver Petition at 10-11; API/UTC Comments on US West/Bell Atlantic Waiver Petitions at 15; Chicago Fiber Optic Comments on US West/Bell Atlantic Waiver Petitions at 7.
[168] AT&T Comments on New England/Pacific Waiver Petitions at 22-23.
[169] Florida Public Counsel, *et al.*, Reply Comments on US West/Bell Atlantic Waiver Petitions at 4.
[170] Minnesota AG Comments on US West/Bell Atlantic Waiver Petitions at 5.

its total access bill. Pacific contends that each IXC's share of NTS costs would depend more heavily on the growth or decline in total NTS costs and the growth or decline in switched access minutes and special access lines.[171] Pacific further argues that it is unlikely that any of the factors affecting the allocation of NTS costs would vary significantly in the course of a year. Rather, changes in IXC market shares would be affected by their services, prices, and marketing ability.[172] Furthermore, Pacific proposes in its reply to address the "free ride" problem for new entrants by charging such new entrants NTS costs on a usage basis pending the next annual NTS cost allocation.[173]

75. Numerous commenters also discuss the impact of the flat-rate proposals on the OCC discount. Not surprisingly, AT&T and the OCCs reach different conclusions on this issue. Under the BellSouth proposal, for example. AT&T contends that the OCCs would receive a discount of more than 55 per cent in non-equal-access areas, while also receiving a discount in areas converted to equal access because they would have the option of ordering access on either a BHMC or a per line or trunk basis.[174] AT&T asserts that it would not have this option because it can order access only on a BHMC basis under the access tariffs of the BellSouth operating companies.[175] On the other hand, MCI argues that the BellSouth plan would increase NTS costs for Feature Group A substantially. MCI notes that BellSouth would continue to impose the CCLC on terminating FGA usage. In addition, MCI complains, BellSouth would assess a BHMC charge on originating capacity, even where lines are ordered as two-way only for testing purposes and no traffic is actually originated over the line.[176] AT&T would not bear this expense and the OCCs' non-premium discount would be decreased as a result.[177] ARINC contends that the BellSouth proposal is discriminatory because it fails to

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171 Pacific Reply Comments at 8-9.

172 *Id.* at 9.

173 To do this, Pacific would develop an originating usage rate and a terminating usage rate by dividing the "revenue objective" for the originating and terminating categories by the total of forecast minutes for the respective category. The resulting rates would be applied to the new IXC's actual usage each month. Pacific Reply Comments at 10.

174 Where access is ordered on a per line or trunk basis, BellSouth originally proposed to assume 30 BHMC per line or trunk for purposes of assessing the Transitional Fixed Charge.

175 AT&T Comments on BellSouth Waiver Petition at 9-10.

176 MCI Comments on BellSouth Waiver Petition at 6.

177 MCI Comments on BellSouth Waiver Petition at 6-7.

provide a discount for FGA access provided by AT&T for its FX customers.[178]

76. BellSouth contends that its plan does not materially affect the OCC discount. After noting that the Commission has determined that the OCCs should be permitted to order on a per line or trunk basis, BellSouth offers to modify its proposal by eliminating the assumption that OCCs would have 30 BHMC per line or trunk. BellSouth would, instead, use the same engineering tables it uses to convert AT&T's BHMC to lines and trunks to determine the BHMC attributable to a given number of OCC lines or trunks.[179] BellSouth further argues that its plan would not discriminate against the OCCs. To the extent of OCCs have a lower level of traffic loading than AT&T, BellSouth argues that they will need fewer lines and thus would incur lower NTS costs than AT&T.[180] Finally, BellSouth responds to MCI's assertion that the BellSouth plan artificially shifts NTS costs from originating to terminating usage, by noting that NTS costs are not incurred as a result of either originating or terminating use nor can they be directly related to such usage.[181]

77. The IXCs' positions are the same on the impact of the US West and Bell Atlantic proposals on the non-premium discount.[182] AT&T argues that US West's proposal would raise the 55 per cent discount because presubscription is not available with non-premium access lines and thus customers served by such lines (*i.e.*, FGA and FGB lines) would not be counted by the US West NTS cost allocator.[183] US West replies that, overall, its plan would not increase the OCC discount because the OCCs would pay a non-discounted rate on all terminating minutes of use, including FGA and FGB. The result, according to US West, is that the OCCs will pay about the same amount in total NTS costs and the relationship between the NTS cost burdens borne by AT&T and the OCCs will remain "relatively constant."[184] Bell Atlantic states in its Reply Comments that the OCCs' concerns can be easily resolved. Bell Atlantic proposes to discount the number of switched access connections used by the OCCs in non-equal access areas by 55 per cent. The OCCs would thus

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[178] ARINC Comments on BellSouth Waiver Petition at 4-5.
[179] BellSouth Reply Comments at 11-12.
[180] *Id.* at 10-11.
[181] *Id.* at 13.
[182] *See e.g*, GTE Sprint Comments on US West/Bell Atlantic Waiver Petitions at 12 and 25; NTIA Comments on US West/Bell Atlantic Waiver Petitions at 22.
[183] AT&T Comments on US West/Bell Atlantic Waiver Petitions at 8.
[184] US West Reply Comments at 35.

receive an effective 55 per cent discount.[185]

78. Other issues concerning the effect of various plans on interexchange competition were also raised in the comments. For example, AT&T complains that US West's use of 1+ lines as its NTS cost allocator effectively charges AT&T all the NTS costs of subscriber local loops in unconverted end offices.[186] In response, US West reiterates that each IXC will pay approximately the same total amount in NTS costs as it currently pays. Furthermore, US West contends that the majority of end offices that may never be converted are located in rural areas and are presently served only by AT&T. So long as IXCs, rather than end users, are required to pay the NTS costs of subscriber loops, US West believes that it is proper for AT&T to bear the full cost burden for end offices that it alone serves.[187]

79. The IXCs also argue about the competitive impact of BellSouth's use of "ordered and installed" BHMC to allocate NTS costs. On the one hand, AT&T contends that it is unfair that the OCCs can order access either by BHMC or by lines or trunks. It asserts that BellSouth's assumption of 30 BHMC per line or trunk would allow the OCCs alone to order on the less expensive basis every time.[188] On the other hand, GTE Sprint argues that the use of "ordered and installed" capacity is unreasonable. Sprint asserts that this will cause IXCs to pay NTS costs for lines and trunks subject to long provisioning delays.[189] In addition, Sprint argues that the use of "ordered and installed" capacity will put the OCCs at a disadvantage relative to AT&T because AT&T is better able to forecast its needs for capacity than the OCCs and, as a result, is less likely to overorder capacity. The OCCs, by contrast, are likely to have an inflated level of ordered and installed capacity because they must order well in advance of end office conversion and without detailed traffic volume data. Moreover, the OCCs must retain sufficient non-premium access to be able to continue to provide service in the event of delays in end office conversion.[190]

80. Furthermore, AT&T argues that the capacity measures chosen by the petitioners as cost allocators could potentially harm IXC competition because they are essentially arbitrary and non-cost-based. For example, AT&T asserts that Bell Atlantic's

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[185] Bell Atlantic Reply Comments at 16-17.
[186] AT&T Comments on US West/Bell Atlantic Waiver Petitions at 8.
[187] US West Reply Comments at 36.
[188] AT&T Comments on BellSouth Waiver Petition at 9-10.
[189] GTE Sprint Comments on BellSouth Waiver Petition at 9.
[190] GTE Sprint Comments on BellSouth Waiver Petition at 9-11.

allocator, circuit capacity, does not accurately reflect IXCs' relative usage of the local exchange network.[191] Similarly, AT&T argues that the use of BHMC as a cost allocator, as proposed by BellSouth, cannot be rationalized as reflecting NTS costs because NTS costs do not vary with capacity.[192] BellSouth responds that, although it is true that NTS costs do not vary with capacity, it is also true that NTS costs do not vary with usage. Nevertheless, the currently effective CCLC recovers these costs through a per minute charge.[193]

81. Finally, some commenters contend that the BellSouth plan would discriminate against FGA users and small carriers. They contend that 30 BHMC on an FGA line cannot generate as much revenue as 30 BHMC on an FGD trunk because of the longer call set-up time on FGA lines.[194] Ad Hoc Users argue that FGA FX users and small carriers (particularly in the start-up phase) cannot be expected to reach this level of usage.[195] As mentioned above, BellSouth dropped its assumption of 30 BHMC per line or trunk in its reply.[196]

c. Effects on Consumers

82. The comments raise a number of issues concerning the effects of these interim NTS proposals on services to consumers. The most important concerns addressed by the commenters are how the proposals would affect service to rural communities, how the US West proposal would affect the presubscription process, and how the proposals will affect special access and WATS end users.

83. Some commenters argue that certain of the IXC flat-rate proposals would reduce the incentive for IXCs to offer service in rural areas. For instance, MCI contends that the Bell Atlantic and BellSouth proposals would have such an effect because of the relatively low trunking efficiency possible in sparsely populated rural areas.[197] NTCA concurs, calling the BellSouth proposal a "step down the road to abandoning small and rural [exchange

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[191] AT&T Comments on US West/Bell Atlantic Waiver Petitions at 17.

[192] AT&T Comments on BellSouth Waiver Petition at 6.

[193] BellSouth Reply Comments at 9.

[194] US Telecom Comments on BellSouth Waiver Petition at 7. US Telecom recommends that an IXC's capacity be measured from a revenue-producing perspective and that fewer BHMC be attributed to FGA lines than to FGD trunks.

[195] Ad Hoc Users Comments on BellSouth Waiver Petition at 8.

[196] BellSouth Reply Comments at 11-12.

[197] MCI Comments on US West/Bell Atlantic Waiver Petitions at 24-25; MCI Comments on BellSouth Waiver Petition at 9.

carriers] and their subscribers to their fate, leaving the national goal of universal service . . . in the dust."[198] BellSouth responds that fewer lines would be needed to serve the lower traffic volume in rural areas and that NTS costs would thus be lower for IXCs serving such areas.[199]

84. A number of commenters argue that, because the US West plan assesses NTS costs on the basis of an optional service, *i.e.*, 1+access, it invites IXCs to lower their NTS payments by avoiding that service.[200] Thus, they assert that IXCs would have an incentive to minimize presubscription, particularly of residential and small business customers,[201] and establish rate structures that encourage only high-volume toll users to presubscribe to their services.[202] The commenters also note that the use of 1+ lines as an NTS cost allocator would distort customer choice between 1+ access and 10XXX access.[203]

85. US West responds that the IXCs have already spent considerable money attempting to persuade customers to select their services, rather than those of the other IXCs, in the presubscription balloting. US West does not believe that the IXCs will now change the focus of their marketing campaigns and seek to persuade the public to presubscribe to other carriers simply to avoid paying NTS costs. Moreover, US West expresses doubt about the legality of MCI's suggestion that the IXCs would screen, and presumably block, calls from low-volume toll users. Finally, US West argues that interexchange competition will cause IXCs to design rate structures and service options

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[198] NTCA Comments on BellSouth Waiver Petition at 6-7.

[199] BellSouth Reply Comments at 10-11. Bell Atlantic does not respond to the comments concerning the effect of its plan on rural service.

[200] Colorado Consumer Counsel, *et al.*, Comments on US West/Bell Atlantic Waiver Petitions at 13-14. The Colorado PUC staff, in its comments, proposes certain modifications to the US West proposal that it believes would cure the deficiencies it finds in the plan. It proposes that a CCLC be applied to Feature Group A, B, and C traffic so that these lines would bear a share of the NTS cost burden. In addition, the Colorado PUC staff suggests that end users be permitted to presubscribe with IXCs either as 1+ customers or as 10XXX customers. Lower volume users would presumably choose to be 10XXX customers. Under the Colorado plan, the IXCs would then be permitted to pass on to end users the NTS costs they pay for 1+ lines as a minimum charge to 1+ customers. Further, the IXCs would not be allowed to impose a minimum charge on 10XXX customers but would be permitted to pass through the CCLC paid on usage of these lines to the customer. Colorado PUC Staff Comments on US West/Bell Atlantic Waiver Petitions at 6-9.

[201] Minnesota AG Comments on US West/Bell Atlantic Waiver Petitions at 4-5.

[202] Florida Public Counsel, *et al.*, Comments on US West/Bell Atlantic Waiver Petitions at 4.

[203] Idaho PUC Reply Comments on US West/Bell Atlantic Waiver Petitions at 3.

aimed at capturing their desired segments of the market. US West asserts that end users thus will be offered more, not fewer, choices due to its proposal.[204]

86. The commenters also assert that specific classes of customers may be hurt by the capacity-based NTS cost allocation plans. For example, RCA argues that Pacific's proposed Special Access Rate Element would result in patently unreasonable special access rate increases.[205] Some of the commenters urge that we not allow BellSouth to implement its proposed WATS Access Line Charge. They observe that some of the changes contemplated by the BellSouth proposal already are under consideration in the WATS access charge rulemaking in CC Docket No. 86-1 and argue that any modification of the BellSouth proposal required by our decision in that proceeding would create great uncertainty in the marketplace.[206] A number of commenters assert that special access users would be hurt by Bell Atlantic's proposal to include special access circuits in its capacity allocation formula. ALC argues that the Bell Atlantic plan does not reduce the subsidies that the Commission has attempted to eliminate, but would merely shift a portion of them from switched to special access.[207] Ad Hoc Users claims that a flat, per circuit surcharge would impose a far greater share of NTS costs on each special access minute of use than on each switched access minute of use.[208] Finally, some commenters contend that the Bell Atlantic plan would effectively increase special access charges by as much as 250 to 500 per cent.[209]

87. In response to such arguments, Pacific asserts that the temporary economic balancing of switched access and special access services would prevent the long-term economic impact on end users that would result from uneconomic bypass. Moreover, Pacific contends that arguments regarding unwarranted increases in special access rates are illusory because special access users have enjoyed artificially low rates for a number of years. Finally, Pacific emphasizes that it does not intend to engage in arbitrary ratemaking and notes that our tariff review process provides

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[204] US West Reply Comments at 12-15.

[205] RCA Comments on New England/Pacific Waiver Petitions at 6.

[206] *See* ARINC Comments on BellSouth Waiver Petition at 4; Ad Hoc Users Comments on BellSouth Waiver Petition at 6-7.

[207] ALC Comments on US West/Bell Atlantic Waiver Petitions at 9.

[208] Ad Hoc Users Comments on US West/Bell Atlantic Waiver Petitions at 23-24.

[209] RCA Comments on US West/Bell Atlantic Waiver Petitions at 6; Teleport Comments on US West/Bell Atlantic Waiver Petitions at 3.

ample protection from this practice.[210] BellSouth states that its proposed WATS Access Line Charge could be modified, even after implementation, to conform with our decision in the WATS access charge proceeding.[211] Bell Atlantic states that rate shock should be avoided whenever possible and therefore proposes that its plan could be phased in over a period of one to two years in order to reduce the immediacy of the impact of any possible rate increases.[212]

d. Legal Difficulties

88. The commenters also argue that there are various legal obstacles to the adoption of these capacity-based NTS proposals. For example, a number of commenters contend that the Bell Atlantic plan would impose an unlawful tax on special access and private facilities bypass.[213] MCI also contends that Pacific's proposed Special Access Rate Element constitutes a tax and violates Section 201(b) of the Communications Act, which prohibits unjust and unreasonable pricing.[214] Bell Atlantic responds that its proposal is no more a tax on special access or private facilities than the Commission's current NTS cost recovery system is a tax on switched access or than mandatory pooling is a tax on switched access end users in low cost jurisdictions.[215] Some state representatives agree with Bell Atlantic.[216] Pacific contends that, inasmuch as NTS costs must be recovered in large part from someone other than the cost-causer, requiring some contribution

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[210] Pacific Reply Comments at 14-16.

[211] BellSouth Waiver Petition at 8.

[212] Bell Atlantic Reply Comments at 16.

[213] RCA Comments on US West/Bell Atlantic Waiver Petitions at 8; Teleport Comments on US West/Bell Atlantic Waiver Petitions at 4-5; Chicago Fiber Optics Comments on US West/Bell Atlantic Waiver Petitions at 8.

A further concern raised in the comments is that the Bell Atlantic proposal would be difficult to implement. GTE Sprint expresses doubt that Bell Atlantic could devise an adequate procedure to ensure that all voice-grade special access and private bypass facilities would be counted and assessed a share of NTS costs under its plan. Sprint observes that Bell Atlantic has not explained how it would identify the entities that are required to file reports of access facility connections. Moreover, Sprint says that Bell Atlantic has not proposed any mechanism for determining the accuracy of such reports. GTE Sprint Comments on US West/Bell Atlantic Waiver Petitions at 17-18.

[214] MCI Comments on Pacific Waiver Petition at 8; *see also* ARINC Comments on New England/Pacific Waiver Petitions at 7.

[215] Bell Atlantic Reply Comments at 12.

[216] *See* DC PSC Reply Comments on US West/Bell Atlantic Waiver Petitions at 1 (Proposal not a tax because IXCs will be paying same NTS costs as under current method). Florida Public Counsel, *et al.*, Reply Comments on US West/Bell Atlantic Waiver Petitions at 3-4 (Proposal is merely a fixed rate for availability of service, like SLCs).

from special access users is logical and will help prevent uneconomic bypass.[217]

89. Several commenters also contend that various aspects of the proposals violate the BOCs' obligations under the Modification of Final Judgment (*MFJ*) in *United States v. American Telephone & Telegraph Co.*[218] These commenters raise two main issues relating to the *MFJ*. First, many argue that the flat-rate proposals violate the requirement of the *MFJ* that charges for access service be equal per unit of traffic.[219] Second, some contend that the plans would charge the OCCs for services that are not provided to them. For example, MCI argues that the BellSouth plan would assess a BHMC charge for originating capacity even on lines that generate no originating traffic except for testing purposes.[220] MCI also argues that the Bell Atlantic plan violates the *MFJ* "[b]y effectively requiring access customers to pay end user NTS charges even when that access is not provided."[221] ALC agrees that, to the extent that an IXC is required to bear a greater share of the overall NTS cost recovery burden because of its use of private access facilities, it would be paying for access that it did not utilize.[222] Both Bell Atlantic and BellSouth deny that the equal-per-unit-of-traffic rule would be violated by their proposals. They note that this *MFJ* provision quite clearly applies only to local transport between offices and facilities of IXCs, while their proposals apply to recovery of NTS costs for facilities between the end office and the customer's premises.[223] US West asserts that the commenters have raised these arguments in the wrong forum, inasmuch as authority over the *MFJ* rests with the District Court, not with this Commission.[224]

e. Relationship with the NECA Pool

90. Some commenters make arguments concerning the specific relationship of IXC flat-rate plans with the NECA pool. GTE

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[217] Pacific Reply Comments at 14.

[218] 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[219] *See, e.g.*, ALC Comments on US West/Bell Atlantic Waiver Petitions at 5-6; ALC Comments on New England/Pacific Waiver Petitions at 9; MCI Comments on BellSouth Waiver Petition at 8-9.

[220] MCI Comments on BellSouth Waiver Petition at 6.

[221] MCI Comments on US West/Bell Atlantic Petitions at 24.

[222] ALC Comments on US West/Bell Atlantic Waiver Petitions at 8, n.12.

[223] BellSouth Reply Comments at 14-15; Bell Atlantic Reply Comments at 14-15. *See also* Southwestern Bell Reply Comments on US West/Bell Atlantic Waiver Petitions at 5.

[224] US West Reply Comments at 45.

Telephone and United Telephone, for instance, argue that permitting a LEC implementing such a plan to settle with the pool on the basis of actual minutes of use would give rise to perverse incentives on the part of the LEC, since its revenues from IXC flat charges would be fixed for the year, but its payments to NECA would vary according to the access minutes that IXCs actually used. Only if forecast minutes equaled actual minutes would the LEC come out even. If actual minutes turned out to be *less* than forecast, the LEC would benefit, for its revenue would remain constant even though its pool obligations would decrease. And if actual minutes were stimulated above the level forecast, the LEC would be harmed, since the LEC would incur a pool obligation for every additional minute while receiving no extra revenue. Thus, it is argued that the LECs would do better financially if their plans depressed traffic than if they stimulated traffic. United Telephone argues that, in light of the problem, the LEC should be required to remit to the pool all common line revenues collected from the IXCs.[225] GTE Telephone suggests that the LEC be required either to remit all common line revenues to the pool or to base its monthly pool commitments on the access minute forecasts.[226]

2. Discussion

91. As we indicated above,[227] the flat-rate capacity charge is one of the acceptable models for interim NTS plans. We believe that capacity charge plans, if properly structured, can accomplish the objectives sought by petitioners without interfering with the achievement of important goals of this Commission. We therefore find that the public interest allows LECs the flexibility to implement interim NTS cost recovery mechanisms that utilize capacity-based charges to IXCs in a manner consistent with the guidelines established in this *Order*. The applicable guidelines include those set out in Part IV for any interim NTS plan and those presented in this Part specifically for capacity charge plans.

a. Effects on Allocation of Risks Between LECS and IXCs

92. Based on our analysis of the record, we have concluded that all the flat-rate proposals, as filed, contain a central deficiency that must be remedied before any such interim NTS plan can become effective. As noted by the commenters, the flat-rate

[225] United Telephone Comments on US West/Bell Atlantic Waiver Petitions at 7.
[226] GTE Telephone Comments on BellSouth Waiver Petition at 5.
[227] *See supra* para. 64.

proposals would result in a shift, from the LECs to the IXCs, of the risks associated with the collection of NTS costs. This risk-shifting results because these plans propose to allocate a significant portion or all of the LECs' NTS costs among IXCs at the beginning of the year and to recover 100 per cent of those costs without regard to whether the interstate usage of LEC facilities changes during the course of the year. We agree with those commenters that argue that this effectively amounts to a guarantee that the LECs would recover their NTS revenue requirement in full. Under our current rules, no other element of the carriers' requirement for access is guaranteed. Rather, in the event of a general economic downturn, both the IXCs and the LECs would suffer the consequences of reduced calling volumes.[228] In sum, this Commission has never contemplated that IXCs should serve as guarantors of the LECs' recovery of NTS costs. A petition seeking waiver of our cost recovery rules would, therefore, not be the proper mechanism for achieving so fundamental a shift in policy. Thus, while we have concluded that the waiver process is an appropriate vehicle for the approval of interim NTS plans, we also conclude that this process should not be utilized to shift the risks of recovering the NTS costs of interstate access to the IXCs.

93. Moreover, none of the petitioners has stated that it seeks to shift the risk of recovering NTS costs to the IXCs. Indeed, as we have already noted, Pacific expressly denies that its proposal would unduly shift the burden of recovering NTS costs to IXCs. Pacific argues that its plan does not constitute risk-shifting because the Commission has already allocated a fixed portion of NTS costs to be recovered from the IXCs. This argument is unpersuasive. Although we did, indeed, establish the CCLC to recover a portion of NTS costs from IXCs during the transition to end user charges, we did not thereby insulate LECs from the risk of underrecovery of NTS costs. The IXCs already bear the risk that a general economic downtown will harm their business. Petitioners have advanced no reason why they should be insulated

[228] If calling volume declined, the LECS would recover less than their full NTS revenue requirement because of lower CCLC revenue. Under our current rules, NECA may, of course, file tariff revisions seeking an increase in the CCLC rate element. Such a revision does not automatically take effect, however, but is subject to the normal tariff review process. Moreover, even if a rate increase were allowed to take effect, the carriers would not be permitted to engage in retroactive ratemaking in order to recover the portion of the revenue requirement that they failed to recover because usage came in below forecast levels while the old rate was in effect.

from this same risk. We therefore will not permit a LEC to implement an interim NTS plan that would allocate its revenue requirement among IXCs so as to shift the risk of underrecovery of its costs. We will, revenue requirement however, permit capacity-based charges as a mechanism for recovering NTS costs. This will require a LEC implementing such a plan to forecast the total amount of IXC access capacity in order to develop a charge per unit of capacity as a part of its annual access tariff filing. The LEC must measure the IXCs' capacity and assess the capacity charge each month.

94. In light of our conclusion not to allow the LECs to levy an annual NTS cost assessment against IXCs and thus insulate themselves against the risk of underrecovery of NTS costs, we have decided not to allow Pacific to implement its proposed NTS cost allocator. Pacific's plan would have allocated the portion of CCL costs not recovered through its proposed Special Access Rate Element among IXCs based upon their proportion of originating and terminating switched access minutes. If Pacific employed access minutes not merely as a means of allocating its NTS costs among IXCs, but as the basis for determining a "capacity" charge that would be assessed IXCs monthly, it would, in essence, be applying a usage-sensitive CCLC.[229]

b. Effects on Full and Fair Interexchange Competition

95. In addition to the concerns that we have already addressed, we share with the commenters concerns about the effect of the flat-rate proposals on competition in the interexchange market. If we are to achieve our goal of promoting such competition, we must take care that any interim NTS cost recovery mechanism does not unduly favor some IXCs at the cost of others. Therefore, we will impose certain conditions on the grant of any waiver of our rules for the purpose of protecting full and fair interexchange competition.

96. In particular, we are concerned that flat-rate capacity-based charges may have the potential to harm to OCCs, especially smaller carriers and new entrants.[230] Capacity-based charges clearly have a tendency to favor IXCs that are able to load more traffic per trunk than their competitors. Such carriers will pay a

[229] This charge would be derived by dividing Pacific's residual NTS revenue requirement by total switched access minutes.

[230] We note that the problem of the "free ride" for new entrants identified by AT&T will be rendered moot by our refusal to allow LECs to make an annual allocation of their NTS costs.

lower rate per unit of traffic than IXCs that use their capacity less intensively. Since larger trunk groups are able as a matter of engineering to carry more traffic per trunk at a given level of blocking than smaller trunk groups, it appears that capacity-based plans could differentially benefit the larger carriers, principally AT&T.[231] On the other hand, it is possible that some OCCs may have chosen for business reasons to load substantial amounts of traffic onto their trunks, at the cost of a somewhat higher blocking rate. These OCCs may actually benefit from a plan that recovers NTS costs on the basis of capacity rather than usage. Therefore, in order to evaluate the effect of any interim NTS proposal on interexchange competition, we will require a LEC filing a waiver petition to implement such a proposal to set out the relative contributions to the CCL revenue requirement during the last two years of all IXCs currently operating in the relevant study area. For comparative purposes, petitioners should also calculate the contributions that these carriers would have made during this period if the proposed interim NTS plan had been in effect.[232]

97. Furthermore, any interim NTS plan must retain the OCC discount for non-premium access. Where equal access is not available, the quality of access available to the OCCs is markedly inferior to the access available to AT&T. We have therefore required that a non-premium discount be given to the OCCs.[233] One possible method of retaining the non-premium discount in capacity charge plans is the approach proposed by Bell Atlantic, which would essentially discount by 55 per cent the number of an OCC's access facility connections in non-equal-access end offices.

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[231] It certainly is not our goal to penalize network efficiences that larger carriers are able to achieve, any more than we would wish to penalize efficiencies smaller carriers might enjoy. Nevertheless, we note that the relative savings that would be enjoyed by the larger carriers under some of the capacity-based charges have nothing to do in reality with their being more efficient, for these trunking efficiencies have nothing to do with more efficient use of the local loop plant whose NTS costs are included in the CCL revenue requirement.

[232] These data may be reported on an aggregate basis for all OCCs — that is, LECs may indicate the relative contributions from AT&T and all other IXCs. These reports should also be useful in resolving claims by OCCs that these interim NTS plans would have differential impacts on particular types of service. Finally, these reports should help resolve the claims by GTE Sprint that such plans would have a differential impact on OCCs because of problems encountered in the equal access conversion process in view of the fact that this process has been under way for almost two years. GTE Sprint Comments on BellSouth Waiver Petition at 9-11. To the extent that such problems do exist, they should be of short duration, for equal access conversion has progressed apace and the rate of conversions should be lower after September 1986.

[233] *See Second Reconsideration Order* at paras. 51-92; 47 C.F.R. §§ 69.206, 69.207.

A similar method of discounting the capacity charge could also be applied to BellSouth's proposal or to other possible capacity measurements.[234]

98. We find, however, that a number of the IXCs' objections to the proposals are without merit. For example, GTE Sprint's contention that BellSouth's charging for ordered and installed capacity is discriminatory appears to be baseless. Sprint claims that this will result in IXCs being charged for capacity that is subject to long provisioning delays. However, BellSouth has not proposed to charge IXCs for ordered capacity that has not been installed. Rather, BellSouth proposes to charge the IXCs for capacity that has been both ordered and installed.[235] Furthermore, the arguments of many commenters that the various flat-rate charges are not cost-based are unavailing. The petitioning BOCs are correct in their assertions that the current NTS cost recovery mechanism is not cost-based. Therefore, the fact that an interim NTS proposal is not cost-based is not, in and of itself, sufficient reason to reject it. Finally, BellSouth's modification of its proposal in reply has rendered most all arguments attacking BellSouth's original assumption that access lines ordered by OCCs on a per line or trunk basis are equivalent to 30 BHMC apiece.[236]

c. Effects on Consumers

99. We are also concerned that any interim NTS plan protect the interests of consumers. We agree with those commenters that argue that we should reject US West's 1+ proposal because it could create perverse incentives for IXCs and subscribers with regard to the presubscription process and encourage IXCs to abandon small end users. Under the US West plan, IXCs would have an incentive to avoid presubscription because presubscribed IXCs would bear a share of NTS costs whereas non-presubscribed IXCs would not. In particular, IXCs would have an incentive to avoid low-volume toll users because a presubscribed low-volume

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[234] We do not mean to imply that carriers cannot devise other methods of retaining the non-premium discount that they believe would be effective and would have other advantages, such as ease of administration.

[235] Thus, capacity that an IXC has ordered, but that has not yet been installed by BellSouth would not be subject to the charge. Similarly, capacity that BellSouth has installed at an end office in the expectation that an IXC will need it, but that the IXC has not yet ordered, would not be included in the charges to the IXC.

[236] *See* BellSouth Reply at 11–12. BellSouth now proposes to convert the number of lines or trunks ordered by the OCCs to BHMC using the same engineering tables that it uses to convert AT&T's ordered BHMC to lines and trunks.

toll user would, in many cases, impose more costs on its IXC than it would generate in revenues. We believe that, by rejecting US West's 1+ cost allocator, we will ensure that small business and residential subscribers will not be denied the benefits of competition in the interexchange market.

100. We do not agree, however, with the concern expressed by a number of the commenters that any capacity-based NTS charge will result in reduced competition in rural areas. As explained above, the LECs will not be permitted to collect the entire NTS revenue requirement through capacity-based charges, but will be required to charge a uniform usage-based rate on terminating access. By shifting some of the CCL cost recovery burden to terminating usage, we should reduce the disincentives the current CCL cost recovery system imposes on OCC provision of originating service in rural areas. In addition, we are requiring that any LEC that files an interim NTS proposal retain the 55 per cent non-premium discount in end offices not converted to equal access. Because a disproportionate share of the unconverted end offices probably will be in rural areas, only by serving such areas will OCCs be able to continue to qualify for this substantial access charge discount. This should also help mitigate any problems that might otherwise be created by the petitioners' proposals concerning this provision of service to rural areas.

d. Legal Difficulties

101. We also conclude that Bell Atlantic's proposal is unacceptable to the extent that its proposes to include private bypass facilities in its measurement of capacity for purposes of recovery of NTS costs from IXCs. We have serious concerns that such a plan, which contemplates a LEC imposing charges for access on the basis of circuits it has not provided, would amount to an unlawful tax.[237] While we agree with Bell Atlantic that including

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[237] As we stated in the *Second Reconsideration Order* at para. 133, n. 58, discussing the application of the special access surcharge:

> A surcharge upon a facility that is not provided by the telephone company would appropriately be characterized as a tax if the facility were used in a manner that does not create the capacity to leak through a PBX or other device. The rule we have adopted would not permit exchange carriers to impose a surcharge in such circumstances.

The charges that Bell Atlantic proposes to impose on the basis of an IXC's use of private access facilities would not be related to any capacity to leak traffic into the local switched network through a PBX or other device. Bell Atlantic, simply seeks, in effect, to recover its NTS costs by imposing charges on facilities that it has not provided and that make no use of the local exchange. This raises the same type of unlawful tax issues we were concerned with in our

special access circuits in capacity charges would not amount to a tax, we do not think that a LEC has the discretion to impose, or that we have the authority to permit, charges on the basis of an IXC's use of purely private transmission facilities. Furthermore, excluding private facilities from capacity measurements has the further benefit that it would significantly reduce the administrative problem of counting the facilities on which a LEC may properly impose NTS charges.[238] Information concerning the number of switched and special access circuits an IXC has ordered from a particular LEC should be readily available to both parties.

102. We have also decided to allow the LECs to include in their interim NTS plans an interim surcharge on special access lines (including WATS closed ends) that are used for services that are close substitutes for MTS services. We find that these access lines, which are being used to bypass the public switched network, may properly be required to bear a share of the NTS cost burden as a reasonable interim measure during the transition to rational economic pricing of access services. Special access lines used to provide services for which MTS is not a close substitute (such as the special access lines used in telex and library data base services) should not be included. Identifying special access lines eligible for a surcharge on a case-by-case basis likely would cause lengthy and costly disputes. Thus, we have decided to designate those services that we believe constitute close substitutes for MTS services: WATS, Megacom, SDN, FX, CCSA,[239] as well as the similar services offered by the OCCs. If a special access line is used for one of these designated services, it may be subject to a surcharge. If it is used for any other service, a surcharge may not be imposed. If a high-capacity special access line is employed, only those circuits used for the designated services would be subject to the interim surcharge.[240]

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discussion of the special access surcharge in the *Second Reconsideration Order*.

[238] The practical difficulties of implementing Bell Atlantic's interim NTS proposal also provide a basis for denying its petition for waiver. As noted by GTE Sprint, Bell Atlantic has not explained how it would identify the entities that would be required to file reports of access facility connections nor has it explained how it would verify the accuracy of such reports.

[239] By CCSA, we mean to include not only Common-Control Switching Arrangement, but also Switched Circuit Automatic Network (SCAN) and Enhanced Private Switched Communications Service (EPSCS).

[240] Resold WATS access lines would not be subject to an interim surcharge under either of the two common service configurations. When an end user reaches the reseller over an ordinary subscriber line, the reseller would incur CCLCs on both the originating and terminating ends of that end user's interstate calls. If, alternatively, the end user connects with the reseller through a special access

103. A number of commenters assert that such an interim surcharge represents strategic pricing of access services. We do not agree. In essence these commenters argue that surcharges on special access represent a departure from the principle of pricing both special and switched access services on the basis of cost. However, the usage-sensitive CCLC is not a cost-based charge. The economically rational, cost-based approach to recovering common line costs would be flat-rate SLCs. But (as explained earlier) because of concerns about the impact of SLCs on universal service, we have not fully implemented such charges. Accordingly, the problem is how to recover these costs in a manner that minimizes the distortions in the marketplace and the costs to society through efficiency losses. Uneconomic bypass is one such distortion and one such loss that we wish to discourage. The partial shift of CCL costs from originating to terminating minutes we mandated in the recent Order in CC Docket No. 86-1, based on our finding that terminating minutes are less subject to bypass, represents one response to this problem. Permitting exchange carriers the flexibility to recover some CCL costs through charges on special access lines is another response.[241] In particular LEC operating areas, it may be less inefficient and disruptive to recover some of these costs through such interim surcharges and reduce the amount that has to be recovered through other means, such as usage-sensitive CCL charges.

104. We also reject the arguments of some commenters that allowing the LECs to recover a portion of their NTS revenue requirement through a surcharge on special access lines would amount to an unlawful tax.[242] ARINC argues that, under Supreme Court precedent, a charge levied against facilities provided

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line, the terminating CCLC would be assessed on the open end of interstate calls and the interim special access surcharge would be assessed on the line from the end user to the reseller. In either configuration, the reseller would also pay the flat access charge imposed on the resold WATS access line. Under these circumstances, where use of the resold WATS access line does not permit avoidance of NTS charges, it would not be appropriate to allow a further interim surcharge to be levied on the resold WATS access line.

[241] Permitting exchange carriers this flexibility is not inconsistent with our recent decision in the *WATS Access Charge Order*. In that order, we decided that our rules should treat WATS closed ends and other special access lines alike for access charge purposes by replacing CCLCs on WATS closed ends with flat special access charges. Permitting limited waivers for an interim surcharge as a stopgap measure where necessary during the short term does not conflict with the major step toward cost-based pricing in our rules that we took in the *WATS Access Charge Order*.

[242] *See* MCI Reply Comments on New England/Pacific Waiver Petitions at 8; ARINC Comments on New England/Pacific Waiver Petitions at 7.

by a telephone company that is unrelated to the services provided to the user is an unlawful tax.[243] However, the *NCTA* case, cited by ARINC, does not support that proposition. In that case, the Court reversed and remanded an opinion of the United States Court of Appeals for the Fifth Circuit that affirmed this Commission's method for recovering the costs of regulating cable television systems. The Court did not conclude that the fee imposed by the Commission on cable television systems constituted a tax. Rather, the Court directed the Commission to reappraise the annual fee imposed to determine whether it was consistent with the statute that granted the Commission authority to levy such fees.[244] The issue of statutory construction raised in that case is obviously not relevant here. Moreover, ARINC has cited no case that deals with an issue similar to the one before us now. We have, however, addressed the question in a recent order, in which we rejected the contention of ARINC and others that allowing telephone companies to impose a special access surcharge on lines that do not leak into the local exchange constitutes unlawful taxation. We there concluded that

> [t]he fact that a rate for a particular telephone company service or facility does not reflect the costs of that service for facility, but a distribution of costs to promote the general purposes of the Communications Act, does not render that rate a tax.[245]

As we have already noted, the imposition of a charge on facilities not provided by the telephone company would raise serious taxation concerns. The interim special access surcharge that we are allowing the LECs to impose, however, merely apportions the telephone company's costs among the services that it does provide in order to help achieve the purposes of the Communications Act. Although this charge may not be cost-based, it is reasonable under the present circumstances.[246]

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[243] *Id.* (*citing* National Cable Television Ass'n v. United States, 415 U.S. 336 (1974)).

[244] 31 U.S.C. § 483a.

[245] Clarification of Sections 69.5 and 69.115, Memorandum Opinion and Order, FCC 85-537, para. 22 (released Oct. 16, 1985).

[246] ARINC also argues that the special access surcharge proposed by Pacific must be rejected because it does not preserve the exemptions contained in section 69.115 of our rules applicable to the special access surcharge. This argument is without merit. The surcharge set forth in section 69.115 is limited to special access lines capable of "leaking" traffic into the switched network, and the exemptions are directed toward that end. The surcharge Pacific has proposed is broader in scope and purpose and the exemptions in section 69.115 of our rules would not be germane. As ARINC is no doubt aware, that section is one of the rules Pacific is asking us to waive to permit it to implement its interim proposals.

105. We will not, at this time, impose a precise dollar limit on the level of the interim surcharge on eligible special access lines. Such as surcharge, however, should not disproportionately burden special access users, which will be an issue examined in the tariff review process. The market also will constrain the rates that the LECs impose, for an unreasonably high surcharge would only drive end users to permanent facilities bypass. The LECs are acutely aware of the risks and the consequences of facilities bypass and have a strong incentive not to encourage its growth. Given these limits and Pacific's proposal of $25 surcharge, we expect that any interim special access line surcharges will fall in the range of $25-30.[247]

e. Relationship with the NECA Pool

106. As discussed earlier, the relationship of any interim NTS plan with the mandatory pooling of interstate NTS revenues and costs administered by NECA is a matter of highest import.[248] We will not permit any interim NTS plan to modify the basic functioning of the NECA NTS pool.[249] We here decide that, especially in light of the options available within this model, the specific method used to protect the NECA pool from the effects of interim capacity charge plans should be determined separately for each particular plan submitted.

107. Capacity charge plans adopted under these guidelines could involve a combination of charges imposed on each IXC's units of capacity at its points of termination, and surcharges on special access lines used for certain designated services. By contrast with the end user charge plan proposed by New England, these proposals would constitute only a modification of the current regime of CCLCs and special access surcharges, and not a major departure. Thus, this type of plan would appear to impose relatively minimal risks on other pool members by the use of actual access minutes for settling with the pool. And settlement based on actual minutes and actual costs would save the administrative resources necessary to administer a plan settling with the pool based on forecast access minutes. Nevertheless,

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[247] This range would appear to be below any cap that might be set by limiting interim surcharges to a reallocation of overhead costs common to all access lines, such as general office expenses, commercial expenses, and reserve plant.

[248] *See supra* paras. 65-66.

[249] As discussed *supra* at para. 65 n.154, we intend to refer to the Bell Atlantic and the New Jersey Board of Public Utilities rulemaking petitions seeking changes in the NECA pooling process to the Federal-State Joint Board.

because the question is close and LECs can select various options within this model, we are not prepared to mandate that interim NTS plans under this first model settle with the NECA pool on the basis of actual minutes. Rather, we will address the question of how best to protect the NECA pool on a case-by-case basis for each plan filed under this model.

f. Summary of Guidelines for Capacity Charge Plans

108. In summary, we are prepared to grant waivers of our rules to allow LECs to implement capacity-based interim NTS plans that meet certain conditions. First, they may not shift the risk of recovering the NTS revenue requirement to the IXCs. Thus, plans that simply allocate a LEC's NTS revenue requirement among IXCs are not acceptable. Rather, we will permit charges that are stated in terms of dollars and cents per unit of capacity, and are determined and collected on a monthly basis. We do not believe that this will prove to be excessively burdensome. We have limited the types of capacity measurements that we will allow the LECs to use. Capacity-based plans may not include private bypass facilities, as Bell Atlantic proposed; nor may they be based on the number of customers presubscribed to an IXC, an US West proposed; nor may they be based on a previous period's minutes of use, as Pacific proposed. We also have taken steps to protect full and fair competition in the interexchange market by requiring petitioners seeking to implement this kind of interim NTS plan to submit studies dealing the impact their proposed capacity charges would have had on IXCs in the two years prior to the filing of the proposal. We have also required that any LEC filing an interim NTS plan retain the non-premium discount for capacity related to traffic from end offices not yet converted to equal access. Finally, we will allow LECs to incorporate an interim surcharge on special access lines (including WATS closed ends) used for certain designated services as a means of recovering a portion of NTS costs from services that are a close substitute for MTS.

B. Direct End User Charge Proposal

109. The second model for interim NTS plans derives from New England's proposal, which seeks to collect the originating portion of the CCL revenue requirement directly from end users on a usage-sensitive basis. New England would include in this new end user charge not only these NTS costs, but also one-half of the Billing and Collection revenue requirement and all the traffic-

sensitive (TS) costs associated with delivering an interstate call to an IXC's POP. The rate structure proposed by New England would include volume discounts, both in the NTS portion and the TS portion. The NTS taper is designed to collect the same level of revenues as would the CCLC. After originally proposing to use an increase in voice-grade special access charges to replace the revenues lost because of the TS discount, New England had modified the TS taper so as to collect all the required TS access revenues within the TS taper itself. New England apparently proposes to remit to the NECA NTS pool based on the NECA CCL rate and the level of access MOU forecast in its region absent implementation of its plan. Any additional revenues resulting from stimulated usage attributable to its plan would be retained in its area and returned to New England customers in the form of lower end user charges.

1. Comments

110. The commenters raise several sets of issues about particular aspects of the New England proposal. They express concern about the proposal's effects on end users, the NECA NTS pool, geographically averaged toll rates, network efficiency, and interexchange competition. They also raise questions about New England's proposed treatment of Billing and Collection costs and about some possible practical difficulties in implementing this proposal.

a. Effects on End Users

111. Several commenters allege that New England's proposed taper unjustly discriminates against low- and medium-volume end users. AT&T, for instance, argues that the taper would cause those end users to pay more NTS costs per loop than high-volume end users and that application of the taper to traffic aggregated by location rather than by line would penalize smaller end users.[250] MCI similarly contends that low-volume end users would be paying more than they would under full SLCs, while high-volume users would not even by paying their own NTS costs.[251] US Telecom likewise argues that the biggest loser would be those end users with monthly interstate usage between 100 and 200 minutes of use.[252] A related concern is that the absence of

[250] AT&T Comments on New England/Pacific Waiver Petitions at 8; AT&T Reply Comments on New England/Pacific Waiver Petitions at 4–5.
[251] MCI Reply Comments on New England/Pacific Waiver Petitions at 3–4.
[252] US Telecom Comments on New England Waiver Petition at 6.

peak/off-peak pricing in the New England access charges would harm those low-volume end users who make most of their interstate calls during off-peak periods. The access costs now included in the IXCs' time-of-day discounted rates would be replaced by tapered usage charges containing no time-of-day discount.

112. A number of commenters raise the issue whether the New England proposal would lead to undue customer confusion. AT&T contends that the proposal would cause serious confusion because end users would be receiving two bills for their interstate calls — one from New England and one from their IXC. According to AT&T, the New England bill may well be on a different billing cycle than the IXC bill and New England's proposed bulk bill would not allow end users to cross-check their two bills. AT&T advocates that New England be required to bill tapered usage-sensitive access charges directly to the IXCs.[253] ALC argues that the New England proposal would cause more customer confusion than divestiture, SLCs, and equal access put together.[254] MCI agrees that the two bills under the New England proposal would lead to customer confusion.[255] In a joint comment, the Massachusetts Department of Public Utilities, the New Hampshire Public Utilities Commission, and the Vermont Public Service Board note the possibilities for customer confusion, but argue that these are marketing problems, the risks of which New England should be allowed to assume.[256]

113. Several parties objected to New England's original proposal to increase voice-grade special access charges in order to fund a discount in TS charges for an end user's monthly switched usage in excess of 7000 minutes of use.[257] Western Union advocated that New England revise its proposal so as to recover the TS discount through higher charges for the lower usage rate bands or through higher terminating access charges.[258]

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[253] AT&T Comments on New England/Pacific Waiver Petitions at 16–18.

[254] ALC Comments on New England/Pacific Waiver Petitions at 8.

[255] MCI Reply Comments on New England/Pacific Waiver Petitions at 4–5.

[256] Mass DPU, *et al*, Comments on New England/Pacific Waiver Petitions at 3.

[257] Teleport Comments on New England/Pacific Waiver Petitions at 8; AT&T Comments on New England/Pacific Waiver Petitions at 13; AT&T Reply Comments on New England/Pacific Waiver Petitions at 6–7; Ad Hoc Users Comments on 7; Dow Jones Comments on New England/Pacific Waiver Petitions at 5; ARINC Comments on New England/Pacific Waiver Petitions at 8; ADAPSO Comments on New England/Pacific Waiver Petitions at 12–17; Western Union Comments on New England/Pacific Waiver Petitions at 25–26.

[258] Western Union Comments on New England/Pacific Waiver Petitions at 25.

114. In reply, New England contends, first, that its proposal does not unjustly discriminate against low- and medium-volume end users. It asserts that, contrary to the arguments of some commenters, high-volume end users would not pay rates less than the cost of their services. For example, multi-line business customers with more than 7000 minutes per month of originating traffic would pay their own NTS costs through their SLCs in New England's states and would contribute $153 toward the NTS costs of other end users. While lower volume users might pay a bit more than under the present scheme, the vast majority of end users would experience increases of $1 per month or less. End users with 3 hours and 20 minutes of interstate usage in a particular month would face the greatest increase — $5.12 per month. In addition, all low-volumes users would benefit in the long term by a reduction in uneconomic bypass.[259] And end users who make no interstate calls in a given month would experience no rate increase (that month) and would also enjoy the long-term benefits the reductions in bypass incentives resulting from the plan.

115. Second, on the issue of customer confusion, New England responds that the short-term and long-term benefits of its proposal would outweigh any possible customer confusion. It contends that multiple bills in telecommunications have become commonplace in the competitive telecommunications marketplace and that its consumer research indicates that customers understand the concept of two bills for interstate calls and in some cases regard the new arrangement as a positive step toward full disclosure of charges. With respect to potential customer problems in cross-checking their two bills, New England states that it would be willing to provide end users with detailed information. In response to AT&T's suggestion that New England be required to bill the IXC rather than the end user, New England contends that it would be easier to bill such charges directly to the end user.[260]

116. Third, while New England contends in its reply that its proposed increase in voice-grade special access charges to fund its TS discount would be lawful and good policy, it nevertheless states in its reply that it will revise that aspect of its plan. New England would instead recover the shortfall caused by its TS

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[259] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 19-20.

[260] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 30-32 & Att. 2, at 6-8.

discount by increasing the TS charge for all minutes of use under 7000 each month from 4.53 cents/minute to 4.73 cents/minute. The change would increase the maximum end user impact, relative to payments under the CCLC, by 40 cents/month, to $5.12.[261]

b. Effects on the NECA Pool

117. Several commenters raise specific concerns about the effects of the New England proposal on the NECA pool. NECA contends that the New England proposal entails a significant break with the concept of a mandatory pool and would certainly affect other pool members, potentially in an adverse fashion.[262] NTCA and the staff of the Missouri Public Service Commission also appear to contend that the pool would be serving as guarantor for New England of the proposal's risks while that company would reap any benefits.[263] NECA argues more particularly that New England should not be allowed to settle with the pool based on its actual NTS costs if it remits to the pool on the basis of forecasted access minutes, for that would make pool members liable for all costs in excess of the forecasts without collecting any revenues received greater than those forecast.[264] Another significant problem alleged by NECA and other commenters is that of distinguishing access minutes stimulated by the New England proposal, revenues from which would be retained by New England, from access minutes stimulated by factors such as reductions in the nationwide CCLC and general economic growth, the revenues from which should be included in the pooling process.[265] Finally, NECA raises the concern that New England fails to explain how its relationship to the pool would change over time.[266]

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[261] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 26-28.

[262] NECA Comments on New England/Pacific Waiver Petitions at 2-4. *see also* ALC Comments on New England/Pacific Waiver Petitions at 15.

[263] NTCA Comments on New England/Pacific Waiver Petitions at 10; Missouri PSC Staff Reply Comments on New England/Pacific Waiver Petitions at 3.

[264] NECA Comments on New England/Pacific Waiver Petitions at 3-4. GTE Telephone, although supporting New England's use of forecast access minutes for settlement with the NECA pool, also argues that New England should be required to remit its pool contribution before covering any of its own NTS costs and to forgo recovering any shortfall in costs from the pool. GTE Telephone Companies on New England/Pacific Waiver Petitions at 2.

[265] NECA Comments on New England/Pacific Waiver Petitions at 4-5; NTCA Comments on New England/Pacific Waiver Petitions at 10; Missouri PSC Staff Reply Comments on New England/Pacific Waiver Petitions at 2-3.

[266] NECA Comments on New England/Pacific Waiver Petitions at 4.

118. In reply, New England responds that its proposal would not adversely affect the pooling process. New England argues that, under its proposal, it assumes all the risks caused by its proposal with respect to pool revenues. New England contends that this approach is consistent with the Commission's philosophy with respect to the operation of optional alternative tariffs.[267] New England also argues that the NECA pool would stand to lose approximately $100 million in terminating CCLC revenues if its plan does not go into effect, given the potential for uneconomic bypass in its region.[268] With respect to the relationship between New England and the pool after the first year, New England states that it will "recalculate its pool obligation just as it was calculated for 1985 and pay in accordance with its proposal."[269]

c. Effects on Geographically Averaged Toll Rates

119. Several commenters contend that the New England proposal would have a significant detrimental effect on geographically averaged toll rates. Some argue that New England's assumed reduction in AT&T's rates for interstate calls originating in New England territory to reflect the shifting of costs from IXCs to end users constitutes geographic deaveraging of toll rates.[270] Some commenters look at individual interstate calls and complain that deaveraging has occurred because the end user is likely to incur different costs for services depending on whether they are calling from New England territory, or some other geographic location.[271] The Missouri PSC staff aruges that no assurances have been given that universal service will be maintained under New England's proposal of deaveraged toll rates.[272] In response to these arguments, New England contends that its plan does not affect geographically averaged toll rates, but merely

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[267] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 33-34.

[268] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 35-37.

[269] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 34 n. *.

[270] MCI Comments on New England Waiver Petition at 7; Missouri PSC Staff Reply Comments on New England/Pacific Waiver Petitions at 3-4; Ad Hoc Users Comments on New England/Pacific Waiver Petitions at 18; US Telecom Comments on New England Waiver Petition at 9; Taconic Comments on New England/Pacific Waiver Petitions at 4.

[271] *See, e.g.*, MCI Reply Comments on New England/Pacific Waiver Petitions at 5-7.

[272] Missouri PSC Staff Reply Comments on New England/Pacific Waiver Petitions at 4.

introduces a volume discount for its portion of the call that redistributes the burden among end users.[273]

d. Effects on Network Efficiency

120. Several IXCs argue that New England's proposal would introduce serious new impediments to network efficiency. Some argue that the volume discounts would lead to increased peak-period calling, which would result in inefficient congestion of the interexchange network.[274] In addition, the IXCs argue that application of the taper on the basis of location rather than line would provide end users with incentives to construct inefficient private networks connecting locations so as to aggregate traffic to qualify for cheaper rates under the access taper.[275] Several commenters argue additionally that the original New England proposal would encourage uneconomic facilities bypass by increasing access charges on special access lines.[276] US Telecom argues that expedited approval of time-of-day access pricing would lead to improved network efficiency.[277] Finally, several commenters argue that the New England proposal would decrease efficiency by repressing interstate calls by low- and medium-volume end users.[278]

121. Some commenters believe that the proposal does add some elements of increased efficiency to the network. ALC supports the New England proposal insofar as it shifts NTS costs to end users as a gain in network efficiency.[279] The Massachusetts DPU, New Hampshire PUC, and Vermont PSB note that the account billing basis for the volume discount may be beneficial if it stimulates usage, making the discount available to more customers.[280]

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[273] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 32-33.

[274] AT&T Comments on New England/Pacific Waiver Petitions at 16; AT&T Reply Comments on New England/Pacific Waiver Petitions at 7-8; MCI Comments on New England Waiver Petition at 4-5.

[275] AT&T Comments on New England/Pacific Waiver Petitions at 8; AT&T Reply Comments on New England/Pacific Waiver Petitions at 4-5; MCI Comments on New England Waiver Petition at 4.

[276] AT&T Reply Comments on New England/Pacific Waiver Petitions at 6-7; US Telecom Comments on New England Waiver Petition at 10-11; Dow Jones Comments on New England/Pacific Waiver Petitions at 10; Western Union Comments on New England/Pacific Waiver Petitions at 18.

[277] US Telecom Comments on New England Waiver Petition at 3.

[278] MCI Comments on New England Waiver Petition at 3; MCI Reply Comments on New England/Pacific Waiver Petitions at 3-4; AT&T Reply Comments on New England/Pacific Waiver Petitions at 4-5.

[279] ALC Comments on New England/Pacific Waiver Petitions at 13.

[280] Mass DPU, *et al*, Comments on New England/Pacific Waiver Petitions at 4.

122. New England responds that its proposal would increase network efficiency by placing responsibility for designing LEC access rates on the LECs themselves.[281] New England also contends that its proposal would increase network efficiency because the traffic stimulated by its taper would result in incremental net revenue contributions, which benefit low-volume end users. It also notes that any service that provides a discount from the full MTS business day rate for business day calls, such as WATS, Megacom, and SDN, all could be alleged to have the flaw of stimulating traffic during the peak period.[282]

e. Effects on Full and Fair Interexchange Competition

123. Several IXCs raise questions about the effect of the New England proposal on interexchange competition. In the initial round of comments, the OCCs complained that the original proposal was discriminatory, because in end offices not yet converted to equal access, it was only applicable to AT&T traffic.[283] MCI suggested that the proposal be implemented only in end offices that have been converted for equal access.[284]

124. In its reply, New England responds by modifying its proposal to provide any IXC now employing FGA or FGB service in unconverted end offices with three options. The IXC could have its FGB end users included under the proposal (and the IXC could convert end users from FGA to FGB without charge for these purposes). The IXC could choose to be billed by New England at a flat rate of $104 per FGA or FGB line or trunk, plus a usage-sensitive TS rate of .97 cents/minute, which includes a 55% nonpremium discount. Or the IXC could choose to continue paying the CCLC.[285]

f. Inclusion of Traffic-Sensitive and Billing & Collection Costs in End User Charge

125. Some commenters question New England's inclusion of TS and Billing and Collection costs in its end user charge and its use

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[281] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 13-14.

[282] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 15-16.

[283] ALC Comments on New England/Pacific Waiver Petitions at 10; MCI Comments on New England Waiver Petition at 15; MCI Reply Comments on New England/Pacific Waiver Petitions at 7.

[284] MCI Comments on New England Waiver Petition at 18.

[285] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 21-22.

of a volume discount for the TS costs. For example, AT&T argues that TS access charges have never been considered within the scope of alternative access tariffs and that end user billing would be inconsistent with several recent Commission policy directives. AT&T also objects to New England's proposed bundling of the present distance-sensitive local transport rates into a single, distance-insensitive TS charge as an unwarranted departure from the current cost-based TS access elements. This departure allegedly would discourage the economic location of IXC facilities, thereby increasing total access costs.[286] Some commenters complain that New England has not justified its 50/50 split of Billing and Collection costs among end users and the IXCs. Others express concern about the leverage the proposal would bring to bear on IXCs to subscribe to New England's Billing and Collection services.[287]

126. New England responds to these issues in various ways. With respect to Billing and Collection, it argues that since the same equipment now being used to bill the CCLC to IXCs would be used to bill end users, it is "not feasible" to distinguish costs attributable to the different services. Therefore, an equal division is fair, along the lines of the 50/50 split of recording costs.[288] New England also contends that IXCs would not be forced to subscribe to New England's billing and collection services, which will only cover its costs.[289]

2. Discussion

127. We conclude that, subject to certain guidelines set out below, volume discounts and direct end-user billing for interstate

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[286] AT&T Comments on New England/Pacific Waiver Petitions at 10-15; AT&T Reply Comments on New England/Pacific Waiver Petitions at 6-7.

[287] MCI Comments on New England Waiver Petition at 12.

MCI also is concerned about the pressure the proposal allegedly would exert on independent LECs in New England to adopt the proposal, and New England's inability to distinguish between interstate and intrastate traffic for purposes of assessing access charges. *See* MCI Reply Comments on New England/Pacific Waiver Petitions at 5-7.

[288] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 23.

[289] *Id.* at 23-24.

New England also denies that its plan would adversely affect any independent LECs in its territory. *Id.* at 22. With regard to the problem of distinguishing between interstate and intrastate traffic, New England responds that it plans to file unified tariffs at the state level, thereby obviating any problems. In the meantime, it promises to bill the lower of the two rates for FGA and FGB service. *Id.* at Add. A, at 1.

NTS costs now collected through the CCLC may be an unacceptable model for an interim NTS plan.[290]

a. Effects on End Users

128. We believe that use of a volume discount and direct end-user billing does not necessarily discriminate unjustly against low- and medium-volume end users. Where, as here, the volume discount is directed toward reducing uneconomic bypass, every end user contributes toward common NTS costs, and the maximum increase for any end user is reasonable in light of that user's overall interstate telephone bill,[291] we do not believe that the reduction in the subsidy being received by the low-volume end user constitutes an unjust discrimination.[292] Both we and the Joint Board have indicated that the use of volume discounts in access tariffs to prevent bypass does not constitute unjust or unreasonable discrimination in violation of the Act.[293] In addition, we will require that any additional revenues resulting from stimulation caused by the proposal be flowed through in the form of reductions in the rates for usage bands with per-minute rates greater than the average.[294]

129. We agree, however, with the arguments of various commenters that a substantial potential exists for customer confusion under the New England proposal. Therefore, we will require any LEC filing an interim NTS plan under this paradigm to provide detailed billing of its access charges so that the end user will be able, without further request, to reconcile its bills for long-distance calls. In addition, we will require any LEC seeking to implement such an interim NTS plan to permit end users to designate a willing third party, such as an IXC, to act as agent to order access and to receive billing information from the LEC. In

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[290] We do not mean, by the guidelines for this model, to preclude use of the interim special access surcharge as described above, *see* paras. 102–105, in a plan using a direct end user charge or by itself.

[291] Of course, as New England observes, end users who make no interstate cals in a given month pay no more under such a volume discount plan in that month than under the current plan. For these end users, their total contribution to CCL cost recovery is through the payment of the flat-rate SLC.

[292] Whether any particular volume discount rate structure is reasonable will be an issue to be reviewed in the tariff process.

[293] *See* MTS/WATS Market Structure and Amendment of Part 67, Recommended Decision and Order by the Federal-State Joint Board, 49 Fed. Reg. 48,325 at para. 43, *adopted by the Comm'n*, Decision and Order, 50 Fed. Reg. 939 (released Dec. 28, 1984).

[294] In the New England proposal as filed, this would require the revenues from stimulation to be reflected in reductions in the first usage band, 0–200 minutes of use per month.

that fashion, an end user may be able to obtain one bill for long-distance calls, which would distinguish between access costs and other transmission costs of each call.

130. We also are concerned that the absence of peak/off-peak pricing in the end user charge would effectively result in significant interstate rate increases for low-volume users who do most of their calling on weekends and at nights to take advantage of time-of-day and day-of-week discounts in IXC rates. Under the New England proposal, low-volume users would be charged more than 11 cents per minute for originating access alone, whenever they call. This apparently could lead to significantly higher total charges for night/weekend calling than presently would be the case under most IXCs' discounted rates. As a result, we will require a LEC submitting a proposal under this model to include a peak/off-peak differential in its end user charge to ameliorate this problem or demonstrate in its filing that the costs of implementing such a differential outweigh the benefits it would provide low-volume users.[295]

b. Effects on the NECA Pool

131. With respect to the NECA pool, the issue is how best to preserve the current operation of the pool while permitting LECs some flexibility in the collection of their revenue requirement for originating access. As with capacity-based plans there are two principal methods, each with some support in the comments for preserving the integrity of the pooling process with respect to a direct end user charge plan. The first would require the LEC to settle with the pool based on its actual switched access minutes of use times with the prevailing CCLC. The second would require the LEC to settle with the pool on the basis of access minutes forecast absent implementation of the plan.

132. A plan like New England's would result in a significant change in the method of collecting NTS costs. The risks of implementing such a plan are of a significantly different type and kind than under the CCLC. For instance, the LEC's forecasting

[295] This peak/off-peak differential is to be distinguished from the differential that we recently declined to permit LECs to implement in the *WATS Access Charge Order*. *See WATS Access Charge Order* at para. 37. The differential we addressed in that order was in CCLC rates charged to IXCs. By contrast, we are concerned here with peak/off-peak pricing of access to the end user. As noted elsewhere in the *WATS Access Charge Order*, we have long endorsed the economic benefits of peak/off-peak pricing of MTS/WATS and MTS/WATS-type services to end users. Such pricing produces economic benefits by serving as a mechanism for leveling traffic loads and enhancing efficient use of communications networks. *See id.* at para. 30.

and planning must be more precise than under the CCLC. Not only must its overall forecast of access minutes be accurate, but its forecast of demand within the particular market segments of the taper also must be on target.[296] In addition, settling with the pool on the basis of actual minutes times the NECA CCLC would lead to perverse incentives for the LEC once the forecast for the year is set, since every minute stimulated above a certain point in the taper (here 200 minutes/month) would bring in less revenue than the LEC's per-minute obligation to the NECA pool. Thus, for this type of plan, there are compelling reasons to insulate other members of the NECA pool from the vagaries of its implementation. This appears to be best accomplished if LECs implementing such a plan settle with NECA on the basis of their forecasted access minutes, as New England has proposed.

133. This approach could involve serious difficulties in implementation, however. Estimating the level of access minutes that would have occurred absent implementation of the interim NTS proposal could be difficult. The effects of other changes, such as the direct assignment of closed-end WATS lines, the implementation of the second dollar in SLC in June 1986, and changes in the separations treatment of Account 645, must be distinguished from the effects of the interim NTS plan.[297] Despite this, the experience of LECs still employing the CCLC, as well as the pre-existing trend lines for the company implementing an interim NTS plan, could be used in order to estimate the plan's stimulative effect. LEC payments during the year would be based on forecast minutes of use times the CCLC.[298]

c. Effects on Geographically Averaged Toll Rates

134. This tapered end user charge would not result in the geographic deaveraging of toll rates. Geographically averaged toll rates serve to benefit rural study areas with high underlying NTS

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[296] An overestimate of the number of conversation MOUs for the 1-200 MOU/month band would lead to underrecovery. Underrecovery would also occur, relative to the LEC's NECA pool obligation, if it underestimated the conversation MOUs greater than 200 MOU/month.

[297] These difficulties might increase during the second year of any interim NTS plan in the absence of appropriate control cases. Not only would the passage of time increase the number of changes independent of the plan that might affect traffic, but the most recent period unaffected by the plan would also be one year further removed from the period for which estimates are being derived.

[298] Actual implementation of an interim NTS tariff under the direct end user charge model would, of course, require delineation of a specific method for making the necessary estimates. New England has yet to specify its method for doing so.

and TS costs, which otherwise would have toll rates significantly higher than other areas in the country. The New England proposal would not have any detrimental effect on these areas, but merely would institute a volume discount within its area for access pricing.

d. Effects on Network Efficiency

135. The proposal would not appear to harm, and might even promote, network efficiency. The IXCs complain that the taper might lead to network congestion during peak hours. Such congestion would appear in large part to be economic in nature, however. All interexchange demand is artificially suppressed by the uneconomic loading of NTS costs into toll rates. Thus, even with the taper, the New England plan still suppresses interexchange calling at peak periods below the level to be expected at economically rational pricing. Thus, any additional congestion of interexchange networks would appear to be the result of traffic stimulated by prices that more accurately reflect underlying costs; this stimulated traffic will continue to grow even further as we continue to move toward economic pricing. We believe that the benefits of stimulated usage, including the more economic use of NTS plant, outweigh the costs of additional congestion of the interstate network.

136. It is appropriate to allow segregation by location for the volume discount. This tariff is designed to respond to service bypass arrangements in which end users construct private networks to aggregate traffic at one location to feed onto dedicated lines. This tariff merely allows a LEC to respond by providing a parallel opportunity that uses the public switched network. The alternative of allowing aggregation by IXC for the volume discount is inappropriate because of its impact on full and fair interexchange competition.[299]

137. There may be some additional uneconomic suppression of calling by low-volume users, but this effect should be more than counterbalanced by enhanced incentives for large end users to stay on the public switched network.[300] In any event, if — contrary to expectations — a direct end user charge plan leads to an overall reduction in usage of switched access services, the burden will fall on the LEC itself under these standards and will not adversely affect other members of the NECA pool.

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[299] *See Optional Alternative Tariff Order* at paras. 32-35.

[300] We expect a LEC to address this tradeoff in the support materials accompanying any tariff it may file to implement this kind of interim NTS plan.

e. Effects on Full and Fair Interexchange Competition

138. In its reply New England appears to provide an adequate response to the problem of ensuring equitable treatment of nonpremium FGA and FGB service, capping contributions by OCCs and providing a 55% discount. Alternatively, the OCCs can take advantage of the New England plan for its FGB subscribers and have its FGA subscribers changed to FGB. We understand from New England's reply that it is now able to aggregate by premises for nonpremium FGB service.[301] Because of this, it will be posssible for New England to offer its plan in unconverted end offices without any undue effect on interexchange competition.[302]

f. Inclusion of Traffic-Sensitive and Billing & Collection Costs in End User Charge

139. Unlike the other proposals, the New England petition seeks changes in the recovery of costs other than the CCL revenue requirement. An end user's call to an IXC's POP and half the costs in the Billing and Collection account now employed to bill and collect the CCLC from IXCs. These aspects of the New England proposal raise significant and novel issues for our consideration.

140. New England justifies its inclusion of a TS charge in its anti-bypass proposal on the basis that the current allegedly uneconomic recovery of TS costs in access charges provides a significant incentive for uneconomic bypass analogous to that provided by the uneconomic pricing of NTS costs. As indicated by the history of CC Docket No. 78-72, we have long been concerned about, and have developed a weighty record on, the impact on the network of the uneconomic recovery of NTS costs. We have no similar record concerning the recovery of TS costs.

141. New England would attempt to ameliorate the alleged incentive for uneconomic bypass in TS pricing through a volume discount. The justification for the taper appeared on in New England's reply in the tariff proceeding. The reply represented that New England's marginal costs of providing TS services are substantially less than its average costs (which now underlie its TS charge) and that its proposed TS charges, even at the

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[301] New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 21.

[302] *Compare Optional Alternative Tariff Order* at para. 33 (optional alternative tariff volume discounts allowed only in converted end offices).

discounted level, are above its marginal costs.[303] In its initial supporting materials, New England justified its TS taper and proposed increase in voice-grade special access charges on the basis that the taper would help prevent bypass by resulting in an improved price relationship between switched and special access, without any reference to the economic costs of providing TS services.

142. In addition to questions related to the propriety of a volume discount for TS services, the New England proposal also raises a number of questions about whether charges for such services should be billed directly to end users. While our original access charge plan contemplated LECs directly billing end users for most NTS costs (albeit on a flat-rate basis), we have always assumed that TS costs would be recovered from IXCs. Thus, this aspect of the New England proposal is arguably a more radical shift from the original access charge model than direct billing of end users for NTS costs. Furthermore, there is a serious issue about the effect of its proposed TS pricing on geographically averaged toll rates.

143. Numerous IXCs have also argued that the billing of TS costs to the end user would provide New England with unfair advantage or leverage over IXCs. In addition, since the filing of New England's petition, we have instituted significant changes in the treatment of Billing and Collection costs in both separations and access charges.[304]

144. We agree with the commenters who argue that New England's proposals for including TS costs and Billing and Collection costs in its end user charge raises several significant issues in addition to the questions about the economic rationality of the current system of TS access charges and the impact of any uneconomic recovery on bypass. In light of the state of this record and the importance of issues involved, we do not believe that our guidelines for interim NTS plans should allow waiver of our access charge rules for these purposes. Nevertheless, our current TS access charges, if uneconomic, may be a significant

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[303] In a brief footnote, New England appears to represent that its marginal costs of providing TS service come to 1.04 cents per minute. New England Reply to Petitions to Reject or Suspend Transmittal No. 774 at 18, n. **.

[304] *See* MTS/WATS Market Structure and Amendment of Part 67, Recommended Decision and Order, CC Docket Nos. 78-72 and 80-286, FCC 85-611 (released Nov. 15, 1985). *adopted by the Commission*, Decision and Order, 51 Fed. Reg. 3176 (1986) (permanent separations procedures for Account 645 costs); MTS/WATS Market Structure and Amendment of Part 67, Report and Order, 51 Fed. Reg. 11,035 (1986) (allocation of Account 645 costs to the access rate elements).

cause of uneconomic bypass. Likewise, there may be cause to waive our new rules concerning Billing and Collection for a proposal like New England's. Thus, New England or any other LEC would be free to submit a waiver petition incorporating these two aspects of the New England proposal if it provides further justification for its plan. We would then intend to seek comments directed specifically to these two issues 30 days after that petition is put on public notice, and reply comments 15 days thereafter.[305]

VI. Summary of Interim NTS Plan Guidelines

145. Thus, in summary, a LEC wishing to implement interim NTS plans will have to comply with the following requirements. The LEC will have to file both a petition for waiver of the relevant sections of our Rules and a tariff implementing its interim NTS plan. We will permit implementation of such a plan only after close review of the petition and tariff and only if consistent with our ability to continue to evaluate carefully other tariffs on a timely basis.

146. The LEC's interim plan will have to comply with three general guidelines: (1) Any tariff implementing an interim NTS plan must expire no later than one year after its effective date. (2) Any interim NTS plan will have to collect the nationally uniform, usage-sensitive CCLC on terminating switched access. (3) Any interim NTS plan may not alter the fundamental operations of the NECA pool, which underly today's geographically averaged toll rates.

147. We would intend to grant waivers for interim NTS plans that meet the general guidelines and conform with either an IXC capacity charge model or a direct end user charge model. Under the IXC capacity charge model, a LEC would be able to impose a charge on IXCs based on units of capacity, a surcharge on special access lines (including WATS closed ends) used for services that are close substitutes for MTS services (WATS, Megacom, SDN,

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[305] We do not expect that the New England plan will exert undue pressure on independent LECs to adopt the plan. Because most independents pool TS as well as NTS costs, the direct effect on them of losing traffic will be mitigated. In any event, the incentive for end users in independent territories to aggregate traffic and ship it to New England to take advantage of the taper is no more than the current incentive for those users to aggregate traffic for service bypass purposes. So, the pressure on independents to adopt the plan appears to be no more than the pressure existing from the possibilities of service bypass.

FX, CCSA,[306] as well as the similar services offered by the OCCs), or both. The LEC would have to measure and bill IXC capacity monthly in order to prevent a shifting of the risk of under-recovery of NTS costs to the IXCs. A LEC would not be allowed to assess NTS charges on private bypass facilities, or to base IXC payments on the number of presubscribed "1+" customers. Under this model, an interim NTS plan would have to retain the non-premium discount for capacity related to traffic from end offices not yet converted to equal access. In addition, the supporting materials would have to include studies detailing the impact the plan would have had on IXCs in the two years prior to the filing of the proposal. Determination of the precise method for ensuring the integrity of the NECA pool would occur on a case-by-case basis.

148. Under the direct end user charge model, a LEC would be able to levy a usage-sensitive NTS charge on the end user according to a tapered rate schedule. The volume discount would have to be structured so as to reduce uneconomic bypass and inefficiencies in the use of the interstate network, and to ensure that every end user contributes toward common NTS costs and that the maximum increase for any end user is reasonable in light of that user's overall interstate telephone bill. The LEC would have to remit to the NECA pool on the basis of the NECA CCLC rate and the access minutes that would have occurred absent implementation of the plan. Any additional revenues resulting from the plan's stimulation of usage must be flowed through in the form of rate reductions for usage bands with per minute rates greater than the average. The LEC would be required to provide detailed billing of its access charges in order to allow end users to cross-check bills received from the LEC and the IXC for their portions of a long-distance telephone call. In addition, end users would have to be permitted under the plan to designate willing third parties (such as IXCs) as agents for the ordering and billing of interstate access, which would allow the end user to receive one bill for long-distance calls. Any LEC implementing this model also must include a peak/off-peak differential in the end user charge or demonstrate that the costs of such a differential would outweigh the benefits to low-volume users. Under this model, AT&T would be expected to adjust its interstate toll rates to reflect its savings of costs that would instead be billed directly to the end user. Such adjustment would be necessary in order to preserve geo-

[306] By CCSA, we mean to include not only CCSA, but also SCAN and EPSCS. *See supra* note 239.

graphically averaged toll rates that protect end users in rural high-cost areas from having higher toll rates than elsewhere in the country.

149. Under the direct end user charge model, a LEC would not be permitted to change its method of recovering costs other than the CCL revenue requirement. Thus, a LEC wishing to change its collection of traffic-sensitive or Billing and Collection costs would have to submit further justification before we could approve its implementation.

VII. Administrative Review

150. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

VIII. Ordering Clauses

151. Accordingly, IT IS HEREBY ORDERED That the Petitions for Waiver filed by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company, the Bell Atlantic Telephone Companies, Pacific Bell, New England Telephone and Telegraph Company, and BellSouth Corporation ARE DENIED.

152. IT IS FURTHER ORDERED That the Vermont Public Service Board's Motion to Accept Late-Filed Comments on the New England waiver petition IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

* Appendix A—may be seen in FCC Dockets Branch, 1919 M. Street, N.W., Washington, D.C.

Concurring Statement of Commissioner Dennis R. Patrick

In re: Petitions for Waiver of Various Sections of Part 69 of the Commissions Rules, filed by: the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company; the Bell Atlantic Telephone Companies; Pacific Bell;

New England Telephone and Telegraph Company; and BellSouth Corporation

In its *Memorandum Opinion and Order* (*Order*) the Commission denies five petitions requesting waiver of our access charge rules, 47 C.F.R. Part 69. Petitioning local exchange carriers (LECs) had sought these waivers so that they could recover fixed costs allocated to the Carrier Common Line access element through charges other than the usage — sensitive charges to be imposed on interexchange carriers under Part 69. The Commission also adopts guidelines to define those alternative plans for recovering non traffic sensitive (NTS) costs for which it would be prepared to grant waivers of its Part 69 rules.

For all reasons presented in the *Order* I agree with my colleagues' decision to deny the requested waivers. As a general matter, I too, favor pricing flexibility for LECs. This preference is not merely a reflection of my regulatory philosophy; it arises from a recognition that such flexibility is an essential tool for responding to threats of imminent and substantial bypass. My colleagues, however, state that they are prepared to grant waivers to carriers submitting NTS recovery plans as long as those plans comply with the guidelines. *Order* at para. 147. While I retain an open mind toward all waiver requests associated with such plans, I do not share my colleagues' apparent predisposition to grant any requests complying with the guidelines without a specific showing of good cause. *See* 47 C.F.R. Sec. 1.2.

This Commission has repeatedly expressed its commitment to protecting universal service and preventing uneconomic bypass. This is a commitment I share. But this Commission has also repeatedly expressed and exhibited its commitment to rationalizing the rate structures of interstate services.[1] In the long-term, such a commitment requires that the person causing specific costs to be incurred bear those costs and that subsidies be restricted to those essential to protecting universal service. If waivers granted under the guidelines presented in the *Order* distract us from or

[1] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (Third Report and Order), *modified on reconsideration*, 97 FCC 2d 682 (1983)(First Reconsideration Order), *modified on further reconsideration*, 97 FCC 2d 834, *aff'd in principal part and remanded in part sub nom.* Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1224 (1985), *modified on further reconsideration*, 99 FCC 2d 708 (1984), *modified on further reconsideration*, 101 FCC 2d 1222 (1985), *appeal pending sub nom.* U.S. Telephone v. FCC, Nos. 84-1115, 85-1386 (D.C. Cir., filed March 23, 1984 and June 24, 1985), *aff'd on further reconsideration*, 102 FCC 2d 849 (1985); Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984).

delay achieving these long-term goals,[2] they present a danger that must be carefully weighed against any short-term relief they might provide.

In this regard there is one guideline I find particularly troublesome. My colleagues would permit a LEC proposing a flat-rate charge alternative[3] to impose a surcharge on special access lines used for services that are close substitutes for MTS. *Order* at para. 102. While the *Order* expresses an expectation that any surcharge would not exceed $30.00, the standard it adopts for determining whether the surcharge level is reasonable is whether it "disproportionately burden[s] special access users." *Id.* at para. 105. The majority justifies the imposition of a surcharge on only these lines ("close substitutes") as a tool for discouraging service bypass by users seeking to avoid the contributions to NTS costs inherent in switched access rates. *Id.* at para. 103. I have some concerns about my colleagues' rationale for deciding *who* will pay the surcharge as well as their standard for deciding *how much* such users should pay.

Cost-based pricing has traditionally been the benchmark against which we measure the reasonableness of tariffs.[4] Admittedly, in response to competitive realities we have recognized a need to revise our standard for determining whether certain service rates are cost-based.[5] We have also recognized that even prescribed rate structures create an imperfect match between cost incurrence and recovery among users of the *same* service or facilities. For example, we have acknowledged that our usage-sensitive carrier

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[2] The *Order*, on its face, limits the period of any such waiver to one year from the effective date of the tariff implementing a carrier's alternative NTS recovery plan. *Id.* at para. 60. I have some doubt, however, that once granted, such waivers would be effective for only one year. The Commission's well-placed concerns about containing administrative costs and customer confusion, coupled with the unavoidable delay in generating significant data establishing the impact on subscribers and the carrier of an alternative plan, make it likely that the Commission would extend these waivers well beyond one year. This seems a particularly likely outcome for a plan like that proposed by NYNEX, which would make a fundamental change in the way subscribers were billed for inter-LATA interstate toll service.

[3] *Order* at para. 58.

[4] *See, e.g.*, AT&T Communications Tariff F.C.C. No. 1 (PRO America Optional Calling Plan), CC Docket No. 85-128, 103 FCC 2d 134, 154 (1985); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part I, 102 FCC 2d 1007 (1985); AT&T Communications, Inc. (Accunet), CC Docket No. 84-906, 101 FCC 2d 144, 167 (1985).

[5] *See* Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, FCC 85-540 (October 17, 1985); Private Line Rate Structure and Volume Discount Practices, supra at 945-48.

common line charge creates such an imperfect match.[6]

In this case, however, the Commission has sanctioned a reallocation of NTS costs to customers who are not using the associated NTS facilities.[7] In this case the surcharge is to be imposed only on lines used for interstate services that are close substitutes for MTS. The majority justifies the surcharge's being imposed on only this group of customers as a means of discouraging bypass. This, I believe, constitutes a sanctioning of strategic pricing. *Cf. Annual 1985 Access Tariff Filings*, FCC 86-379 at para. 7, released September 2, 1986.

Strategic pricing is, of course, an acceptable approach to ratemaking in a free market. I have little confidence, however, that federal regulators in the tariff review process can or should attempt to encourage or discourage consumer conduct through the use of this tool. We should instead be working to rationalize the price structure, based upon the costing methodology that best reflects the dynamics of the exchange access market. If we do this, consumer conduct should take care of itself. Moreover, the procedural setting in which we go about identifying that costing methodology should be a rulemaking proceeding.

Assuming that the exigencies presented by the threat of bypass warrant our departing from our traditional fully distributed costing standard for measuring the reasonableness of rates, I have serious doubts whether it is necessary or wise to replace the cost-based standard with as subjective a standard as the "disproportionately burdensome" test. I would suggest rather that we act, as we did when we established guidelines for Optional Calling Plans and private line volume discount practices, to redefine the standard we use to measure whether rates are "cost-based." For instance, an alternative costing methodology based upon a Ramsey pricing theory,[8] explicitly modified to address public

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[6] *Order* at para. 103.

[7] Thus, this case is clearly distinguished from the "leaky PBX" surcharge. There too we imposed a surcharge on special access lines to recover NTS costs allocated in the first instance under parts 67 and 69 to switched access services. 47 C.F.R. Sec. 69.115 (1985). The "leaky PBX" surcharge, however, was imposed only when a user would have escaped paying the carrier common line charges that would otherwise have been imposed for switched access services it, in fact, received. The level of that surcharge reflected an *ad hoc* effort to estimate a charge that would generate the carrier common line revenues that would otherwise be lost because the local network could not identify these leaky PBX minutes as interstate switched access minutes properly subject to interstate switched access charges.

[8] Ramsey pricing is the term for the generally, although not universally, accepted economic method of pricing the output of an enterprise in those instances in which charging each user the incremental cost of his consumption fails to raise

interest concerns if necessary, would appear to achieve the same short term results as the "disproportionately burdensome" test, but would offer carriers and users alike a more objective standard against which to assess the reasonableness of a proposed surcharge.

In summary, I am skeptical of any proposal to manipulate the market for switched and special access services by consciously introducing further irrationalities to the access service rate structure. I find this course of action even more troubling in the absence of a specific showing of "localized bypass difficulties" warranting waiver of our Part 69 Rules.[9] While I shall review with an open mind all requests for waiver of our Part 69 rules sought to enable telephone companies to introduce alternative NTS recovery plans, these specific concerns prevent me from sharing the majority's apparent predisposition to grant such waivers as long as the associated NTS recovery plans comply with the guidelines. For this reason I join only in the majority's decision to deny the petitions for waiver now pending before us and reserve judgment on any plans which may be filed hereafter.

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sufficient revenues to cover the total costs of the firm. Ramsey pricing defines the set of prices that would raise the necessary revenues with the least distortion, and hence maximizes consumer welfare. *See* Ramsey, "A Contribution to the Theory of Taxation," 37 Economic J. 47 (1927); Dupuit, "On the Measurement of the Utility of Public Work," 8 Annales des Ponts et Chaussees, 2nd Series (1844), translated in 2 International Economic Papers at 83-111 (1952), reprinted in Arrow and Scitousky, ed., Readings in Welfare Economics (1969) (hereinafter Arrow and Scitousky), 255-83; Hotelling, "The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates," 6 Econometrica 242 (1939), reprinted in Arrow and Scitousky, *supra* at 284-308.

[9] *Order* at para. 58.

CATV Technical Standards
Rule Making, Notice of Proposed
Technical Standards

Further Notice of Proposed Rule Making adopted concerning amendment of Parts 15 and 76 relating to terminal devices connected to cable television systems. Commission seeks further comment and information concerning technical standards for cable systems terminal devices (e.g., converters and decoders).

—*Amendment of Parts 15 & 76*
Gen. Docket No. 85-301

FCC 86-363

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 15 and 76 Relating to Terminal Devices Connected to Cable Television Systems	Gen. Docket No. 85-301

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 7, 1986; Released: August 20, 1986

BY THE COMMISSION:

Introduction

1. By this action, the Commission seeks further comment and information concerning technical standards for cable system terminal devices (e.g., converters and decoders). Under the current rules, such devices are subjected to different standards depending on whether they are owned or supplied by cable operators or cable subscribers. Based on the responses to the *Notice of Proposed Rule Making* (*Notice*) in this proceeding,[1] the Commission has

[1] *Notice of Proposed Rule Making* in Gen. Docket No. 85-301, adopted October 16, 1985, 50 FR 42729, October 22, 1985.

revised its initial proposals for addressing this matter. The Commission now invites comment on an approach that would apply uniform standards to cable terminal devices, without regard to their mode of operation, and also seeks additional information with respect to the appropriate signal leakage limits to be specified in the new rules.

Background

2. Under the current rules, terminal devices owned or supplied by a cable system are subject to the signal leakage provisions of Part 76 of the rules.[2] Those owned by subscribers are subject to the different emission limits and less stringent field strength limits of Part 15 of the rules.[3] These differences in regulation exist even though the devices owned by both cable systems and cable subscribers serve the same functions and may, in fact, be identical.

3. In the *Notice*, the Commission stated that the intent of its signal leakage rules is to prevent harmful interference among users of radio frequencies. However, we observed that there appears to be no difference in the potential for harmful interference from terminal devices based on ownership considerations. We further stated that there appears to be no other justification for applying two substantially different standards to these devices. The Commission, therefore, indicated that it believed that the same type of equipment should be subject to uniform standards.

4. The Commission also stated that converters and other terminal devices that might be used by a cable subscriber appear to be similar to equipment such as television receivers and

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[2] 47 CFR § 76.605-.619. *See infra* note 11.

[3] Under the current rules, cable terminal equipment owned by subscribers is regulated under one of three different Part 15 schemes, depending on its configuration and design. Terminal equipment that is part of the circuitry of a television receiver is regulated under the television receiver is regulated under the television receiver standards of Subpart C (47 CFR § 15.59-.82). Converters and decoders that modulate or heterodyne the television signals in their internal processing are subject to rules pertaining to TV interface devices in Subpart H (47 CFR § 15.601-.626). Finally, converters that use microprocessors or other digital circuitry are considered Class B computing devices and are regulated under the standards of Subpart J (47 CFR § 15.801-.840). The emissions limits under each of these Part 15 standards are significantly more lenient than the Part 76 standards. However, there are differences among the Part 15 standards. The emissions limits of Subpart C are different from those of Subparts H and J. In addition, Subpart H specifies requirements for connecting cables or transfer switches, limits for output terminal conducted interference, and limits for output signal levels that are not included in the other subparts.

videocassette recorders (VCRs) in their potential for causing interference. It indicated that the less stringent emission limits for Part 15 devices appear to be adequate to mitigate potential harmful interference from such "in-home" equipment.

5. On this basis, the Commission proposed to resolve the disparity in the current rules by requiring that all terminal devices, regardless of ownership, comply with the emission limits and other technical standards of Part 15. The Commission also proposed not to apply equipment authorization requirements specified in Part 15 to terminal devices owned by cable system operators. With regard to responsibility for elimination of interference, the Commission proposed to treat terminal devices in the same manner as Part 15 devices. Under this approach, the operator of the device would be responsible for eliminating interference. However, the cable operator would be expected to disconnect any subscriber owned device that was found to be conducting harmful interference into the cable system.

6. Sixteen parties filed comments and/or replies in response to the *Notice*.[4] A list of these parties is provided in Appendix A.

Comments

7. The commenting parties are virtually unanimous in supporting the Commission's objective of eliminating the current ownership-based disparity in the technical standards for cable terminal devices. However, they also oppose the proposal to resolve this situation by subjecting all such devices to the current Part 15 standards. The consensus of the commentors is that the proposed plan would merely replace one anomaly with another. As General Instrument Corporation (GIC) and others describe, the Commission's plan would not produce uniformity in the treatment of devices that serve similar purposes because Subparts C, H, and J in fact impose different standards and requirements.[5] They also argue that the factors that determine which set of standards to apply — i.e., whether the circuitry is located outside the TV

[4] Multiplex Technology, Inc. (MTI) filed as comments in this proceeding a copy of a Petition for Rule Making in which it proposes several Part 15 rule amendments. These proposals address issues relating to video multiplexor or devices and their use in conjunction with both cable systems and private video distribution systems such as satellite master antenna television (SMATV) systems. We find that MTI's requests pertain to equipment and issues that are different from those addressed in this proceeding. Accordingly, we find these issues to be beyond the scope of this proceeding and, therefore, will not address MTI's proposals herein.

[5] *See supra* note 3.

cabinet, whether the device modulates the radio frequency (RF) energy, or whether it employs digital processing — should make no difference in the regulation of cable terminal devices. American Television and Communications Corporation (ATC) notes that another problem with the Commission's proposal is that a particular device might qualify for regulation under more than one set of standards. For example, ATC submits that a baseband converter with a microprocessor controlled tuner could be governed by either Subpart J or Subpart H.

8. The majority of the commenting parties also oppose use of the more lenient Part 15 field strength emission limits as the standard for cable terminal devices. The consensus is that the Part 15 standards would not provide adequate interference protection with respect to cable terminal devices. These parties generally recommend that the Commission continue to rely on the more stringent Part 76 rules to regulate emissions from such devices. In statements representative of those opposing use of the Part 15 limits, the National Association of Broadcasters (NAB) and the Association of Maximum Service Telecasters (MST), in joint comments, argue that there is more potential for interference from cable terminal devices than other home electronic devices. NAB and MST submit data indicating that there could be significant interference to reception of broadcast television and FM radio signals at distances up to 60 feet if terminal devices were built to the Part 15 standards. The National Cable Television Association (NCTA) opposes application of the Part 15 standards to terminal devices on the grounds that this would make it more difficult for cable systems to meet the Part 76 standards for signal leakage, particularly the recently adopted Cumulative Leakage Index (CLI) showings.[6] NCTA submits that cable systems generally are unable to distinguish between leakage from terminal equipment and leakage from the plant. Equipment manufacturers supporting stricter emissions standards mention direct interference to television receivers, VCRs and other electronic equipment as potential consequences of less stringent standards.

9. On the other hand, several equipment manufacturers state that the Part 15 standards are adequate to protect against interference produced by terminal devices. In addition, ATC

[6] Section 76.611 of the rules requires that, beginning in 1990, cable systems using frequencies in the aeronautical band must make annual showings that they meet CLI standards. *See Memorandum Opinion and Order* in Docket No. 21006, 101 FCC 2d 117 (1985), 50 FR 29394, July 19, 1985.

argues that the NAB/MST interference analysis is flawed because it assumes a "free air" environment and ignores the presence of physical objects and structures that deflect and attenuate signals emanating from a terminal device.

10. In its comments, NCTA submits a proposal that addresses both the signal leakage limits issue and the problems posed by regulating terminal devices under three different Part 15 subparts. NCTA proposes that the Commission adopt a new subpart of Part 15 that would pertain specifically to all cable terminal devices that are not an integral part of a television receiver. Under this new subpart, emissions generated by sources internal to the device (e.g., from internal oscillators) would be subject to the field strength emission limits for TV interface devices. Emissions resulting from cable signals applied to the input connector of the device would be subject to the Part 76 signal leakage standards. NCTA states that to distinguish between RF energy generated by the cable system and the device itself would more clearly allocate the responsibility for controlling emissions. NCTA further submits that its proposal generally would not impose new burdens on equipment manufacturers because most terminal devices are currently built to the Part 76 standards.

11. GIC, Oak Communications, Inc., and Rabbit Systems, Inc. oppose application of certain Part 15, Subpart H requirements to cable terminal devices. Specifically, they argue that the output signal limits, cabling, and transfer switch provisions of Subpart H should not be applied to cable terminal devices. They contend that these requirements are unnecessary for such devices and, therefore, impose additional, unwarranted costs on manufacturers.

12. Four parties address the issue of equipment authorization requirements. Amador Corporation recommends that all terminal devices be subject to certification in order to ensure that equipment would be in compliance with electromagnetic interference requirements and that non-certified equipment would not be sold to consumers. It states that the cost of testing and application for certification is generally less than one percent of the equipment selling price. Scientific-Atlanta opposes the Commission's proposal to continue to exempt terminal devices owned by cable systems from authorization requirements. It states that compliance with these requirements by system-owned equipment would not impose additional burdens because most manufacturers already file for authorization under Part 15. Scientific-Atlanta further notes that under the Commission's

proposal, converter and cable ready receivers would be subject to verification, while base band units would be subject to certification. NCTA also recognizes these difficulties with the proposed approach and proposes that they be resolved by requiring all terminal devices to be verified under Part 2, Subpart J of the rules, the same procedures used for TV receivers. Finally, Zenith submits that the Commission's proposal would impose indirect cost and timing disadvantages on baseband units, as certification currently requires 8 to 12 weeks for the Commission to process.

13. Four parties, NCTA, NAB/MST, Viacom International, Inc., and Zenith Electronics Corporation address the issue of responsibility for signal leakage. NCTA argues that responsibility for interference should be placed entirely on the operator of the terminal device. NCTA maintains that this approach would alleviate the difficult burden on cable operators of locating terminal interference and disconnecting service that would be required under the proposed rules. Scientific-Atlanta urges the Commission to resolve this problem by further defining the interface between cable system and subscriber equipment. All of these parties support a requirement for the cable operator to disconnect service if an interfering signal is routed up the cable.

Discussion

14. Upon consideration of the record in this proceeding, we continue to believe that the public interest would be served by eliminating the disparity in the rules with respect to cable terminal devices that are owned or supplied by cable systems and those that are owned or supplied by cable subscribers and others. We find it appropriate to regulate terminal equipment and circuitry that is an integral part of a television receiver under Part 15, Subpart C, as initially proposed. In this respect, we conclude that a TV receiver with built-in terminal circuitry is not distinguishable from any other TV receiver in terms of interference potential so long as the receiver unit as a whole conforms to the Subpart C standards.

15. However, we also conclude that the approach proposed in the *Notice* would not be satisfactory with respect to external terminal devices. We find that our original proposal would leave undesirable inconsistencies in the rules. As commentors observe, many terminal devices are designed with features that would qualify them for regulation under more than one subpart and that the proposed approach could lead to considerable confusion over which standards to apply. In addition, we are aware of the

statements of many of the commenting parties with respect to potential interference problems that might result from terminals built to the Part 15 emission standards.

16. In view of these considerations, we have revised our proposals to provide uniform treatment of cable terminal devices not an integral part of a television receiver.[7] We believe the differences in our revised approach are of sufficient significance to warrant providing additional opportunity to comment. Interested parties are invited to submit information and discussion on the revised proposals set forth below. We also seek specific data on actual and predicted interference by terminal devices to other electronic equipment and on the effects on cable system operation of terminal devices.

17. We find that the record supports our initial view that external cable terminal devices are generally similar to TV interface devices such as VCRs in their nature and purpose. In this respect, terminal devices that process video signals and feed modulated RF signals to the input terminals of a television receiver are generally consistent with the definition of a TV interface device.[8] We also observe that both cable terminal devices and VCRs are external to the television receiver and generally are co-located with their associated receivers. Therefore, we propose to regulate all external cable terminals as TV interface devices under Subpart H of Part 15 of the rules. However, as discussed below, there are differences between terminal devices and other types of TV interface equipment. We are proposing specific amendments to Subpart H to address some of these differences and requesting comments on the appropriate policy approach with respect to others.

18. Consistent with the above assessment, we believe that cable terminals also are generally similar to VCRs and other TV interface devices in their potential for producing interference.[9] In this respect, equipment that performs essentially the same function and is used in the same manner could be expected to have the same potential for harmful interference if it is designed to meet the same standards. Therefore, the Subpart H field strength emission limits that are sufficient for VCRs and other TV interface devices should be sufficient for terminal devices.[10] It

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[7] The proposed amendments are indicated in the attached Appendix B.

[8] 47 CFR § 15.4(u).

[9] We note that VCRs have now achieved general acceptance in television households and that we have not found any instances of harmful interference resulting from VCRs that are designed to meet the Subpart H emissions limits.

[10] The Part 15, Subpart H and J emissions limits are: 100 uV/m at three meters

follows then, that it does not appear necessary to apply the more stringent requirements of Part 76 to terminal devices.[11]

19. On this basis, we are proposing to subject cable terminal devices to the field strength emission limits of Subpart H. We are aware of the statements by parties from each of the various interests in this matter that the Subpart H standards may not provide adequate interference protection, particularly with respect to aeronautical and navigation services. Thus, we intend to give careful consideration to information indicating need for more stringent emission limits to protect such services. Any proposals for alternative standards should be accompanied by appropriate test data or other supporting empirical justification. We also invite comment as to whether we should apply a two-part standard, as suggested by NCTA, where: (1) emissions generated by sources internal to the terminal device would be subject to the current limits in Part 15, Subparts H and J, and (2) emissions that result when cable signals are fed to the terminal would be subject to the Part 76 limits.

20. In addition to the field strength emission limits, there are other technical issues to consider for cable terminal devices. The first of these is line conducted voltage interference. A cable system terminal device that is connected to a public utility power line may feed RF energy back into that line. If the energy level is high enough, it can interfere with the operation of other devices connected to the same line. This problem usually occurs at frequencies below 30 MHz. In addition, high conducted voltage levels may result in emission of energy from the power cord that is capable of interfering with nearby equipment. Restricting the line conducted voltage to 250 uV in the frequency range 450 kHz to 30 MHz as provided in Subpart H is normally satisfactory to reduce the incidence of such problems.[12] Therefore, we propose to apply this standard to terminal devices that are intended for connection to a public utility power line.

21. The second of these issues concerns RF energy conducted back into the cable system. RF energy fed back into the cable system has the potential to interfere with operation of the cable

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for frequencies between 30 and 88 MHz; 150 uV/m at three meters for frequencies between 88 and 216 MHz; and 200 uV/m at three meters for frequencies between 216 and 1000 MHz. 47 CFR §§ 15.601-.626, 15.801-.840.

[11] The Part 76 signal leakage limits are: 15 uV/m at 100 feet for frequencies to 54 MHz and over 216 MHz; and 20 uV/m at 10 feet for frequencies between 54 and 216 MHz. 47 CFR § 76.611.

[12] *See Notice of Proposed Rule Making* in MM Docket No. 85-38, 50 FR 7801, February 26, 1985.

system and to produce incidental signal leakage from the cable plant that could interfere with authorized radio services. We request comment as to whether we should adopt standards to limit RF energy fed back into the cable system and, if so, the appropriate limits to established. Alternatively, we intend to consider whether it might be sufficient simply to allow cable operators to disconnect terminal devices that conduct harmful signals back into the cable plant, as originally proposed.

22. The third issue involves output signal levels. Signals at the RF output terminals of a terminal device may be strong enough to interfere with reception of signals by a television receiver, especially those on the output video carrier frequency and on frequencies that are more than 4.6 MHz below or 7.4 MHz above the video carrier frequency. We propose to apply the output signal levels provided in Subpart H to cable terminal devices in order to minimize the risk of such interference.[13] We invite comment on whether such a limit is necessary for cable terminals. In particular, we seek comment as to whether such a limit is necessary for cable terminals. In particular, we seek comment as to whether the typical levels found at the RF output terminals of such devices are low enough not to warrant the imposition of limits. In addition, we note that appropriate input signal levels are essential in determining compliance with this requirement.

23. The last technical issue concerns the connection of an external antenna to a cable terminal device in order to receive over-the-air signals. In cases of devices which provide such a capability, we are concerned that the antenna may act as a radiator for the terminal device. To avoid this problem, we propose to require, as we do for TV interface devices, that manufacturers equip terminal devices that have antenna connection capability with a transfer switch, as specified in Part 15, Subpart H of the rules.[14]

24. In order to ensure that terminal devices are correctly installed, we believe it is necessary to require parties marketing this equipment to provide consumers with all pertinent information concerning the interference potential of the devices and the measures to take to eliminate any problems that may arise. Such information would be contained in an instruction manual provided to the purchaser. The text of the instructions would be determined by the manufacturer/marketer in accordance with the FCC guidelines. In order to further ensure that the equipment operates

[13] 47 CFR § 15.612.
[14] 47 CFR § 15.606.

in compliance with the interference standards, we propose to require that the output signals of terminal devices sold to consumers be coupled to receivers by appropriate connecting cables provided by the manufacturer.[15]

25. We believe it is desirable to subject all cable terminal devices to the equipment verification procedures of Part 2, Subpart J of the rules.[16] This will obviate problems that might otherwise hinder secondary sale of terminal equipment, i.e., sale of a non-certified device directly to a subscriber. As suggested by Scientific-Atlanta, it does not appear that this requirement would add significantly to manufacturer costs as many of these firms already file for Part 15 authorization. With the application of technical standards as described above, we believe the verification procedures would suffice.

26. Finally, we propose to assign responsibility for terminal interference to the party operating the device. Again consistent with our view that terminal devices are generally similar to TV interface devices, we believe this equipment should not be considered part of the cable system proper, regardless of ownership. We also recognize the difficulties that cable operators would face in determining the source of interference if they were responsible for equipment owned by subscribers. We note, however, that in the case that the cable operator owns the terminal device, the cable operator would be considered the party operating the device. Further, equipment designed to meet the signal leakage requirements proposed above would pose minimal interference risks and, therefore, would not be expected to be the source of interference problems for cable systems. In any case, we would allow the cable operator to disconnect any malfunctioning terminal device found to be conducting interfering signals back into the cable system.

Regulatory Flexibility Act — Initial Analysis

27. As required by Section 603 of the Regulatory Flexibility Act the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth below. Written public comments are requested on the IRFA. These comments

[15] 47 CFR § 15.602(b).

[16] 47 CFR §§ 2.902, 2.951–.957. Verification is a self-testing procedure where the manufacturer makes the necessary tests and measurements to ensure that the equipment complies with the appropriate technical standards. No sample units or filings are required routinely.

must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

28. *Reason for Action.* The Commission's rules inconsistently apply different standards to cable subscriber terminal devices, based on the ownership and internal operational design of the equipment.

29. *Objective.* The rules proposed herein are intended to eliminate the present disparity in the standards applicable to cable subscriber terminal devices.

30. *Legal Basis.* The action as proposed in this rule making is in furtherance of Sections 1, 302, 303 and 624 of the Communications Act of 1934, as amended (47 U.S.C. Sections 151, *et seq.*).

31. *Description, potential impact on and number of small businesses affected.* The rule amendments proposed herein pertain to all new cable terminal equipment. The proposed rules would establish uniform technical standards for these devices under Part 15 of the Commission's rules. In addition, Section 76.617 of the rules would be amended to assign responsibility for interference from terminal devices to the operator of the equipment. However, in all cases cable operators would be permitted to disconnect malfunctioning terminal devices that conduct interfering signals back into the cable systems.

32. The proposals are intended to assist equipment manufacturers, cable operators and cable subscribers by establishing uniform regulations for terminal devices and assigning responsibility in cases of interference resulting from subscriber supplied devices. Under the proposed rules, devices would be subject to limits on output signal level and line conducted voltage. However, we believe that these requirements are not burdensome and that they will reduce potential interference problems.

33. *Federal rules which overlap, duplicate, or conflict with the proposed rule*: None.

34. *Any significant alternative minimizing the impact on small entities and consistent with the stated objective*: None.

Paperwork Reduction Act Statement

35. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burden upon the public. Implementation of any new or modified requirement or burden

will be subject to approval by the Office of Management and Budget as prescribed by the Act.

Procedural Matters

36. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general an *ex parte* presentation is any written or oral communications (other than formal written comments/pleadings and normal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state docket number by the proceeding to which it relates. *See* generally Section 1.1231 of the Commission's rules, 47 CFR 1.1231.

37. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before October 14, 1986, and reply comments on or before October 29, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may consider information and ideas not contained in the comments provided that such information or a written indication of the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

38. In accordance with the provisions of Section 1.419 of the Commission's rules and regulations, an original and 5 copies of all comments, replies, or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the

required copies who also wish each Commissioner to have a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in the rule making proceeding may do so by submitting one copy of the comments, without regard to form, provided only that the Docket Number is specified in the hearing. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Commission's Dockets Reference Room (Room 239) at its headquarters in Washington, D.C. (1919 M Street, N.W.).

39. The Secretary shall cause a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612).

40. This Further Notice of Proposed Rule Making is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

41. For further information concerning this proceeding, contact Sharon A. Briley, Policy Analysis Branch, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

* Appendix A — may be seen in FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

Appendix B

A. Part 15 of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

1. The authority citation for Part 15 continues to read as follows:

> Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Interpret or apply sec. 301, 48 Stat. 1081; 47 U.S.C. 301, unless otherwise noted.

2. Section 15.4 is proposed to be amended by revising paragraph (u) to read as follows:

§ 15.4 General Definitions

* * * * *

(u) *TV interface device.* A restricted radiation device that: (1) produces a radio frequency carrier modulated by a video signal derived from an external or internal signal source, and which feeds the modulated radio frequency energy by conduction to the antenna terminals of a conventional television receiver; or (2) interconnects a cable television system to a television receiver or other subscriber premise equipment.

NOTE: A TV interface device may be a stand alone RF modulator, or a composite device consisting of an RF modulator, video source and other components. If such device is located within a television receiver, it shall be subject to the same requirements as a television receiver under Part 15, Subpart C. Devices defined under category (2) above, such as converters and decoders that are external to a television receiver, are subject to the provisions of Part 15, Subpart H.

* * * * *

3. Section 15.602 is proposed to be amended by adding a new paragraph (c) to read as follows:

§ 15.602 Conditions of operation.

* * * * *

(c) A TV interface device as defined under § 15.4(u)(2) shall not be required to comply with the provisions of §§ 15.616 and 15.618.

* * * * *

4. Part 15 is proposed to be amended by adding a new Section 15.619 to read as follows:

§ 15.619 Verification of Cable Terminal Devices.

Devices defined under § 15.4(u)(2) shall be subject to verification, in accordance with Subpart J of Part 2, to show compliance with Subpart H of this part.

5. Part 15 is proposed to be amended by adding a new Section 15.623 to read as follows:

§ 15.623 Cable Terminal Devices: Information to user.

(a) Information shall be provided to the user of a cable terminal device, as defined in § 15.4(u)(2), about the interference potential of the device and simple measures that a user can take to correct interference. (See, *e.g.*, § 15.838). Such information shall be included in a conspicuous place in the instruction manual.

(b) If the cable terminal device requires special accessories, such as shielded cables, in order to comply with FCC emission limits and other technical standards, the manufacturer or supplier of the device shall provide information to the user as to the length of the cables, type of shielding, or other appropriate instructions.

(c) The following information, in the same or similar language, shall be provided to the user of a cable terminal device: If this device causes interference to or disrupts cable service, the cable operator may disconnect service to the user until such interference or disruption is corrected.

B. Part 76 of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 76.5(x) is proposed to be revised by adding a note to read as follows:

§ 76.5 Definitions.

* * * * *

(x) *Subscriber terminal.* The cable television system terminal to which a subscriber's equipment is connected. Separate terminals may be provided for delivery of signals of various classes.

NOTE: Terminal devices interconnected to a cable system shall comply with Subpart H of Part 15.

* * * * *

3. Section 76.605 is proposed to be amended by adding a note to read as follows:

§ 76.605 Technical standards.

* * * * *

NOTE: The requirements of this section shall not apply to devices subject to the provisions of §§ 15.601-.626.

4. Section 76.617 is proposed to be amended to read as follows:

§ 76.617 Responsibility for interference.

Interference generated by a radio frequency (RF) device subject to Part 15 of the rules shall be the responsibility of the operator of the device in accordance with the provisions of Part 15 of this chapter: *Provided*, that the operator of a cable system to which the device is connected shall be responsible for the suppression of interference that is caused by RF energy that is introduced into the system by the device, regardless of its ownership.

Common Carrier, Allowable Expenses
Rulemaking, Notice of Proposed

Notice of Proposed Rulemaking adopted to amend Sections 31.235 and 31.607 of Part 31 of Commission's Rules (Uniform Systems of Accounts for Class A and Class B Telephone Carriers). The amendments would permit (1) expensing of costs related to installation and removal of coin stations, and (2) amortization of embedded investment in coin station premises wiring over one year.

—*Amendment of Part 31*
CC Docket No. 86-322

FCC 86-340

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Petition for Rulemaking of The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company to Amend Sections 31.235 and 31.607 of the Commission's Rules	CC Docket No. 86-322 RM 4966

NOTICE OF PROPOSED RULEMAKING

Adopted: July 29, 1986; Released: August 8, 1986

BY THE COMMISSION:

I. INTRODUCTION

1. On April 11, 1985, The Mountain States Telephone and Telegraph Company (MTN), Northwestern Bell Telephone Company (NWB) and Pacific Northwest Bell Telephone Company (PNB) filed a petition for rulemaking to amend Sections 31.235 and 31.607 of Part 31 of our Rules (Uniform System of Accounts for Class A and Class B Telephone Carriers). The requested amendments would permit (1) the expensing of costs related to the installation and removal of coin stations, including premises

wiring (station connections), and (2) amortization of the embedded investment in coin station premises wiring over one year.

II. BACKGROUND

2. Currently the Rules require that the original cost of public telephone equipment and the original cost of premises wiring installed for use by public telephones be capitalized and recorded in Account 235, Public Telephone Equipment. Expenses associated with this equipment are recorded in Account 607, Repairs of Public Telephone Equipment. These accounts were established in the *CPE Report and Order*, CC 82-681, issued on November 2, 1983 in connection with the detariffing of customer premises equipment.[1] It was determined in these proceedings that the cost of installation should be capitalized because there is no cost-causative customer from whom these costs could be recovered through immediate billings.

3. Subsequent to the decisions on public telephone equipment in the *CPE Report and Order*, in its *Coin Order*,[2] the Commission extended the registration provisions of its Rules to include customer provided coin stations, thereby permitting the connection of such stations to the public switched telephone network.

III. PETITION

4. The Petitioners state that because the local telephone companies were the sole providers of coin telephone service in 1983, when the *CPE Report and Order* became effective, there was reasonable assurance of recovering installation costs from future users. The Petitioners maintain that the Commission's decision to capitalize coin station installation costs was premised on this condition.

5. However, since the Commission subsequently extended the registration program to include customer provided coin stations, many states have issued orders permitting some form of coin operated telephone competition. Among the 14 states served by MTN, NWB, and PNB, the states of Arizona, Minnesota,

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[1] FCC 83-457, In the Matter of Modification to the Uniform System of Accounts for Class A and Class B Telephone Companies required by detariffing of customer premises equipment and proposed detariffing of customer provided cable/wiring installed as part of an intrasystem of PBXs and key systems, CC Docket 82-681, *Report and Order*, 48 Fed. Reg. 50534 (1983) (hereafter called the "*CPE Report and Order*").

[2] FCC 84-270, *Memorandum Opinion and Order*, Registration of Coin Operated Telephones Under Part 68 of the Commission's Rules and Regulations, 49 Fed. Reg. 27763 (July 6, 1984), (Coin Order).

Montana, Nebraska, North Dakota, Oregon and South Dakota currently allow coin phone competition. The Petitioners claim that significant and growing competition now exists, and that increasing numbers of telephone company coin stations are being removed and replaced by customer provided coin stations. As a result, telephone company coin stations are being removed before the cost of installation is fully recovered. They maintain that the Commission's premise for capitalization is no longer valid and that the installation cost should be expensed because cost recovery from future users is no longer assured.

6. The Petitioners also request that embedded costs of installation be amortized over one year because the expected life of the asset has been shortened and this approach is similar to the treatment prescribed for ordinary station connection costs. From April, 1984 through December, 1984, PNB capitalized $954,000 of coin station installation and removal costs. MTN capitalized $2,812,000 during this same period. NWB capitalized $1,058,000 in coin station installation and removal costs over the April through December period. They state that this capitalization creates a future revenue requirement even though the sets may be removed before the installation and removal costs are recovered in rates. Under the Petitioners' plan, telephone companies would still provide lines to customers. The costs of installing such lines to the point of demarcation would still be capitalized. Costs of the telephone company provided coin stations and related enclosures would also still be capitalized.

IV. SUMMARY OF COMMENTS AND REPLY COMMENTS

7. On April 29, 1985, the Commission issued a Public Notice requesting comments regarding this filing. Comments were filed by The American Telephone and Telegraph Company (AT&T); The Bell Atlantic Telephone Companies;[3] New York Telephone Company and New England Telephone and Telegraph Company (the NYNEX Telephone Companies); GTE Service Corporation (GTE); The Washington Utilities and Transportation Commission (WUTC); the United States Telephone Association (USTA); and a joint filing by Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company,

[3] The Bell Atlantic Operating Companies are The Bell Telephone Company of Pennsylvania; The Chesapeake and Potomac Telephone Company; Chesapeake and Potomac Telephone of Maryland; Chesapeake and Potomac Telephone of Virginia; Chesapeake and Potomac Telephone of West Virginia; and the Diamond State Telephone Company.

Nevada Bell, Pacific Bell, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. Reply Comments were filed by the Ameritech Operating Companies;[4] and MTN, NWB and PNB.

8. All of the commenting parties, with the exception of WUTC support the petitioners. WUTC is of the opinion that the expensing of station connections on semi-public phones (those located on private property such as restaurants, and other private retail establishments) would be appropriate as a result of competition in this market. It disagrees that expensing of station connections on all public phones is appropriate because there is no competition in this market in the state of Washington. In addition, WUTC states that it views the use of a one year amortization period as too short, and recommends amortization of embedded investment over ten years.

9. AT&T states that it has a particular interest in this proceeding because it operates in the competitive interexchange marketplace and, unlike the local exchange companies, does not have the ability to recover installation and removal costs of coin operated telephones in future charges to ratepayers. AT&T also states that, as a principal customer of the local exchange companies, it is concerned that those companies recover their coin telephone costs from coin telephone users. AT&T asserts that the removal of telephone company coin stations as a result of competition produces the same "churning" of public telephone apparatus that the Commission found to exist with respect to station apparatus in its order requiring expensing of the entire cost of station connections.[5] In addition AT&T states that, in the case of semi-public coin stations, there is a cost-causative customer who can be billed immediately to recover the costs of installation and removal. AT&T suggests that the Commission consider unbundling the central office controlled coin service function from the coin station and detariffing the coin stations because continuing to tariff coin station activities places carriers

[4] The Ameritech Operating Companies are Illinois Bell Telephone Company; Indiana Bell Telephone Company, Inc.; Michigan Bell Telephone Company; The Ohio Bell Telephone Company; and Wisconsin Bell, Inc.

[5] FCC 81-104, Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations with respect to accounting for station connections, optional payment plan revenues and related capital costs, customer provided equipment and sale of terminal equipment, (Docket 79-105, *First Report and Order*) 85 FCC 24 818, 824 (1981).

at a competitive disadvantage in the provision of coin stations.

10. The NYNEX Companies, GTE, and those parties filing jointly also claim that competition in the coin telephone market produces "churning" of public telephone apparatus which likens coin operated connections to regular exchange connections. The NYNEX Companies, the jointly filing telephone companies, and the Bell Atlantic Telephone Companies state that competition in this market is also being entered by interexchange carriers thus increasing the potential for competition. Bell Atlantic informs us that a tariff for interstate communications use is in effect in New Jersey, and tariffs are pending in Maryland and Virginia. The Pennsylvania Commission, which permits instrument-implemented sets to be connected to measured business lines, has ordered carriers to file tariffs. Each of the other Bell Atlantic jurisdictions is also considering this same issue.

11. In their Reply Comments, the Ameritech Operating Companies address AT&T's suggestion that the Commission require the unbundling of the provision of tariffed public telephone service into the provision of the central office function and the provision of the pay station. They state that a proceeding of this nature is unnecessary in light of the Commission's May 22, 1985 *Memorandum Opinion and Order* FCC 85-269,[6] permitting the continued provision of coinless telephones by AT&T Communications as an integral part of its provision of public telephone service. In this decision, which extended to the BOCs, the Commission found that pay telephone devices form an integral part of pay telephone service and cannot be logically severed from transmission capacity.

12. The Reply Comments of the Petitioners respond to WUTC's Comments. They state that WUTC's proposal for treating competition in the pay telephone market is beyond the scope of their proposal to expense coin station connections. They state that a uniform accounting treatment of these costs is essential and such a uniform solution must recognize that competition in the coin phone market is growing rapidly. They note that the Commission authorized a lengthy ten-year period for the amortization of ordinary station connections to avoid "rate shock". This long run amortization period made some sense because of the large amount of embedded investment in ordinary station connections. As an

[6] FCC 85-269, In the Matter of Petition for Declaratory Ruling of Tonka Tools, Inc. and Southern Merchandise Corp. Regarding American Telephone and Telegraph Company Provision of Coinless Pay Telephones (*Memorandum Opinion and Order*), released May 22, 1985.

example, the Petitioners submit data showing that as of March 31, 1981, MTN, NWB, and PNB had $1.42 billion in embedded investment in ordinary station connections, amounting to $1.24 per customer line per month for ten years. As of December 31, 1984, MTN, NWB and PNB had $4.8 million in embedded investment in coin station connection costs, or $0.037 per customer line per month for 1 year. Since there is no comparably large balance of embedded coin station connections investment, the recovery of which would create "rate shock" for customers, prompt amortization of embedded coin station connections will relieve the capital recovery burdens on future customers.

V. DISCUSSION

13. We agree with Ameritech's conclusion that this Commission's May 22, 1985 *Order* has already established that pay telephone equipment and transmission facilities are not logically severable. The *Order* at paragraph 14 found that:

> "The Computer II exclusion of pay telephone central office equipment from the definition of CPE was based upon the coin service that then existed and reflected the Commission's determination that this equipment was distinguishable from the general class of CPE to be detariffed and should continue to be provided in its traditional manner: as part of an end-to-end communications service. We have reexamined this exclusion in light of the various regulatory and technological changes which have altered pay telephone devices and the environment in which they are offered, and find that the exclusion nonetheless remains valid today for the variety of pay telephones the BOCs and AT&T are making available to the public. We therefore conclude that the pay telephone service provided by AT&T and the BOCs is a communications service which should be provided subject to regulation, and that the coin and non-coin pay terminals made available by these carriers do not constitute CPE for the purposes of Computer II."

Accordingly, while we will consider issues related to expensing versus capitalization of installation and removal costs and amortization periods of embedded investment, we are not proposing the unbundling of the central office controlled coin service functions from the coin stations and detariffing the coin stations as suggested by AT&T.

14. The Petitioners state that from December, 1984 through March 21, 1985, PNB has removed 162 coin stations in Oregon because of competition. Of these, 157 have not been reinstalled; therefore there has been no revenue produced to offset their cost. NWB has removed 448 coin sets through March 31, 1985, and 412 have not been reinstalled. In their comments, USTA cites

these same statistics. Bell Atlantic states that approximately 400 coin stations have been displaced by instrument-implemented sets in Pennsylvania and New Jersey and that they expect this trend will accelerate because this Commission has approved nineteen registration applications, while five more are pending.[7] Bell Atlantic also states that, although it continues to capitalize installation and removal costs ($3.9 million for the May 1984 through March 1985 period), these costs may not be recovered before these sets are displaced. The NYNEX telephone companies state they have stopped purchasing new coin telephone sets. They observe that New York and New Hampshire allow coin telephone competition, that proceedings to consider the issue of coin telephone competition have been instituted in Connecticut, Massachusetts, Rhode Island and Vermont; and that vendors have requested like proceedings in Maine. Those commenters who filed jointly note that more than 1,000 public telephones were replaced by instrument-implemented sets within eleven states during the five month period between November, 1984 and March, 1985. They also expect this trend to accelerate. They also note that interexchange carriers have installed credit card telephones which replace still more public telephones, and that a growing number of state commissions have approved intrastate use of these telephones. These commenters state that the amount in Account 235 will grow rapidly as the telephone companies experience a high churn rate in public telephones. In 1984 the telephone companies debited more than $25 million to Account 235 for installation costs. They claim that the amount to be recovered from future users is increasing while public telephones are being displaced by customer owned equipment. They state that the telephone companies must install ten coin telephones in order to gain one and that this churn rate exceeds that found objectionable by this Commission in Docket 19129. They fear that this churn rate will increase as customers serve the increased demand for public telephone service with their own telephones. The telephone companies say that they are aware of about 150 instances in which instrument-implemented coin telephones have already been placed in public and semi-public areas where no telephone company-provided public telephones previously existed, thus reducing the potential market for future cost recovery.

[7] As of May 21, 1986, this Commission has approved eighty-six registration applications and seven registration applications are pending.

15. The Commission's capitalization decision in the *CPE Report and Order* was based in substantial part upon the absence of cost-causative customers who could be charged immediately for installation of public telephones. Consequently, these costs were capitalized and spread over future periods. The petitioners point to the churning that has taken place in Account 235 as a result of the actions of state regulators who are now, or are now considering, permitting competition in the coin operated telephone market. Since the Commission's *Coin Order*, competitive circumstances may have changed, and if circumstances have changed in the manner the Petitioners allege, it seems that cost-causative customers could be charged directly for semi-public telephone costs. If, in the case of semi-public locations, there is a cost-causative customer from whom costs may be immediately recovered, direct expensing of related costs would be appropriate from an accounting standpoint because revenues would then be matched with costs incurred in the same period. Accordingly, we are proposing an amendment of Sections 31.235 which would allow the expensing of installation and removal costs of coin operated telephones in semi-public locations while requiring capitalization of these costs for telephone company provided coin stations in public locations (proposed amendments are as shown in the Appendices).

16. If there has been a significant change affecting the overall expected life of the equipment in the account, or its separate subclasses, precipitated by competition or otherwise, a factual showing of such changes could indicate that depreciation life adjustments would be an appropriate mechanism for providing relief; and carriers should seek such relief in their depreciation filings. With respect to the semi-public coin station connections, we seek comment on whether other relief would be appropriate and, if so, on an appropriate time period for the amortization of embedded costs, as well as information concerning the amount of this investment and its impact on ratepayers.

17. Other factors may be relevant to this proceeding and interested parties are invited to comment on any other factors for our consideration in reaching a final determination on this subject, but we specifically seek comments on the following:

a). Whether a distinction should be made between public and semi-public coin operated telephones, as shown in Appendix A, or some other distinction would be appropriate.

b). Whether the Commission should amend part 31 to permit the expensing of the installation and removal costs of semi-public coin operated equipment, or all coin operated telephone equipment.

c). Whether the Commission should amend part 31 to permit the expensing of the installation and removal costs of any or all credit card operated telephone equipment.

d). Whether changes in circumstances warrant different amortization of embedded costs of coin station connections in semi-public areas; and, if so, whether they should be amortized over one year, ten years or some other reasonable interval.

18. We would, of course, propose to amend Part 32, which will become effective in 1988, to conform with any amendments we adopt in Part 31 (See Appendix B). Petitions for Reconsideration of CC Docket 78-196, *Revision of the Uniform System of Accounts and Financial Reporting Requirements*, FCC 86-221, adopted May 1, 1986, released May 15, 1986 which address the issues in the instant proceeding will be addressed in this Docket.

VI. REGULATORY FLEXIBILITY ACT

19. We certify that the Regulatory Flexibility Act is not applicable to the rules we are proposing in this proceeding. Although some local exchange carriers are very small, local telephone companies do not appear to fall within the Regulatory Flexibility Act's definition of a "small entity". The Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as the definition of a "small entity". The latter definition excludes any business that is dominant in its field of operation. Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area. The Commission has found all exchange carriers to be dominant in the *Competitive Carrier* proceeding, 85 FCC 1, 23-24 (1980). To the extent that interexchange carriers are affected by these rules, we hereby certify that these rules will not have significant economic effect on a substantial number of small entities. At the time of publication of a summary of this *Notice of Proposed Rulemaking* in the Federal Register, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

VII. EX PARTE CONTACT REQUIREMENTS

20. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex*

parte contacts are permitted from the time the Commission adopts a *Notice of Proposed Rulemaking* until the time a Public Notice is issued stating a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff that addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, and a copy must be provided to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. 1.231.

21. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before September 30, 1986, and reply comments on or before October 15, 1986. All relevant and timely comments and reply comments will be considered by the Commission before further action in this proceeding. The Commission may also consider any other relevant information brought to its attention.[8]

22. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a written summary indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order.* In accordance with the provision of Section 1.419 of the Commission's Rules, an original and five copies of all comments, replies or other documents filed in this proceeding shall be

[8] The Secretary shall, pursuant to Section 220(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 220(i), cause the Notice of Proposed Rulemaking to be served on each state commission.

furnished to the Commission. Participants filing the required copies who also desire that each Commissioner receive a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in this proceeding may do so by submitting one copy of their comments, without regard to form, provided that Common Carrier Docket No. 86-322 is specified in the heading. Such informal participants who desire that responsible members of the staff receive a personal copy may file an additional five copies. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room, Room 239, 1919 M Street, N.W. in Washington, D.C.

VIII. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 203, 204, 205, 214, 220, 221 and 403 of the Communications Act of 1934, as amended, Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553, and Sections 1.411 *et seq.*, of the Commission's Rules, 47 C.F.R., Section 1.411 *et seq.*, there is HEREBY INSTITUTED a notice of proposed rulemaking concerning the matters described herein including those raised by the Petition For Rulemaking filed April 11, 1985 by The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company. Members of the public are notified that any policies that may be established in this proceeding may be embodied in the Rules and Regulations of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Section 31.235 Public Telephone Equipment is amended to read:

Section 31.235 Public and Semi-Public Telephone Equipment

(a) This account shall include the original cost of coin-operated and coinless public telephones and semi-public coin-operated and coinless telephones in separate subclasses, "Public Telephone Equipment Coin-operated", "Public Telephone Equipment Coinless", "Semi-Public Telephone Equipment Coin-operated" and "Semi-Public Telephone Equipment Coinless". The public telephone equipment subclasses shall also include the original cost of the premises wiring installed for use by the public telephones. The semi-public telephone equipment subclasses shall

not include the original cost of the premises wiring installed for use by the semi-public telephones. This amount shall be included in account 607 "Repairs of Public and Semi-Public Telephone Equipment".

(b) This account shall also include the original cost of operating spares that are required to provide a continuity of service for public and semi-public telephones. The operating spares shall not exceed a six months supply in terms of turnover and availability to installers from locations in reasonable proximity to the location of the installed equipment

ITEMS

(Note s31.01-8)

Enclosure—a complete installation with or without booth, directory hangers and shelves, shield and public or semi-public telephone signs.

Mounting (pedestal, post or wall)—a complete installation with or without a base plate.

Directory stand or shelf (in proximity to public or semi-public telephones)—a complete installation with or without directory hangers.

Telephone sets—a complete item (coin operated and credit card).

Note A: The cost of replacing operating spares shall be charged to Account 607, "Repairs of Public and Semi-Public Telephone Equipment".

Section 31.607 Repairs of Public Telephone Equipment is amended to read:

Section 31.607 Repairs of Public and Semi-Public Telephone Equipment

This account shall include the cost of repairs of public and semi-public telephone equipment. This account shall also include the cost of the premises wiring installed for use by the semi-public telephones. Carriers shall maintain the cost of repairs for coinless public and semi-public telephones in separate subaccounts.

ITEMS

(Note s31.01-8)

Cleaning public and semi-public telephone equipment.
House service for public and semi-public telephone equipment.
Inspecting, testing, and reporting on condition of equipment to determine the need for repairs or replacements.
Installation of premises wiring for use by semi-public telephones.
Materials normally used as repair parts for public and semi-public telephone equipment.
Moves or relocations of items of public or semi-public telephone equipment (within the same accounting area).
Repainting and other repairs on booths, including those owned by others.
Repairing used public and semi-public telephone equipment for re-use.
Replacing defective public and semi-public telephone equipment (labor only). (See Note A of this account.)
Supply expense applicable to public and semi-public equipment.
Testing for, locating and clearing trouble in public and semi-public equipment. (See also Account 603.)

Note A: The material cost of operating spares shall be charged to Account 235.

However, the installation labor and repair cost of this equipment shall be charged to this account.

APPENDIX B

Section 32.2351 Public Telephone Terminal Equipment is amended to read:

Section 32.2351 Public and Semi-Public Telephone Terminal Equipment

(a) This account shall include in separate subclasses for public and semi-public telephones, the original cost of coinless, coin-operated, credit card and pay telephones installed for use by the public. The original cost of semi-public telephone equipment shall not include the original cost of installing premises wiring. This amount shall be included in Account 6351 Public Telephone Terminal Equipment Expense.

Rules, Amendment of
Telephone Maintenance Radio Service

Report and Order adopted amending Section 90.81 of rules regarding Telephone Maintenance Radio Service. Rule revised to conform to the post-divestiture structure of telephone industry. This action also enhances utilization of existing TMRS frequency allocation, obviates the need to dislocate the operations of any TMRS licensee and removes the need for certain TMRS licensees to construct duplicate radio systems to meet rule requirements.
—*Amendment to Section 90.81*
PR Docket No. 84-884

FCC 86-361

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 90.81 of the Commission's Rules Regarding the Telephone Maintenance Radio Service	PR Docket No. 84-884

REPORT AND ORDER

Adopted: August 7, 1986; Released: August 20, 1986

BY THE COMMISSION:

Background

1. On August 5, 1985, the Commission adopted a *Notice of Proposed Rule Making* in this proceeding that proposed amendments to the rule governing eligibility and operations in the Telephone Maintenance Radio Service (TMRS).[1] These amendments were proposed in response to the dramatic changes

[1] *Notice of Proposed Rule Making (Notice)* (FCC 85-442), released August 16, 1985, 50 Fed. Reg. 33072 (August 16, 1985). *See also Notice of Inquiry (Inquiry)* (FCC 84-423), released September 26, 1984, 49 Fed. Reg. 39082 (October 3, 1984). The rule governing the TMRS is codified at 47 C.F.R. § 90.81 (1985).

experienced by the telephone industry in the wake of the divestiture of the Bell Operating Companies (BOCs) by the American Telephone and Telegraph Company (AT&T).

2. The Telephone Maintenance Radio Service was established in 1958, when the majority of the communications common carrier facilities in the United States, both local exchange and interexchange (long distance), were owned by AT&T directly or by its BOCs. The TMRS is one of the twenty private land mobile radio services governed by Part 90 of the Commission's rules, 47 C.F.R. § 90.1 *et seq.* Eligibility in the TMRS is limited to communications common carriers offering wireline or wireline and radio communications service to the public for hire (hereinafter referred to as the wireline carriers), and intercity microwave common carriers authorized in the Point-to-Point Microwave Radio Service governed by Part 21 of the Commission's rules (hereinafter referred to as the microwave carriers).[2]

3. The wireline carriers have available for their exclusive use two long-band VHF frequencies (30–50 MHz band), two high-band VHF frequencies (150 MHz band) and six frequency pairs at 450–470 MHz in the UHF band. The microwave carriers (e.g., MCI, Sprint and a number of smaller communications common carriers) have available twelve frequency pairs in the 450–470 MHz band that they must share with eligibles in the Power, Petroleum, Forest Products and Manufacturers Radio Services.[3] In the 470–512 MHz band (governed by Subpart L of Part 90) and the 800 MHz band (governed by Subparts M and S of Part 90), there is no division of frequencies between wireline and microwave carriers, nor are there any frequencies allocated for the exclusive use of TMRS eligibles.

4. In the *Notice*, we observed that the division of frequencies in the TMRS between wireline carriers and microwave carriers seemed inappropriate in today's telecommunications environment where all communications common carriers use various transmission media to carry their traffic.[4] We also noted that the

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[2] *See First Report and Order*, Docket 11991, 42 FCC 820, 831–2 (1958). *See also Report and Order*, Docket 19853, 50 FCC 2d 165 (1974), where eligibility in the TMRS was extended to microwave carriers licensed under Part 21 of the Rules.

[3] Wireline applicants also have access to these twelve frequency pairs when all of their exclusive base and mobile frequencies in the 450–470 MHz band are exhausted within 35 miles of the proposed base station. *See* 47 C.F.R. § 90.81(d)(4) (1985).

[4] We stated in the *Notice*, at para. 14, that the term microwave carrier no longer has the meaning it once did, since many exchange carriers as well as many interexchange carriers employ microwave circuits, and many interexchange carriers use "wires" of one type or another (*e.g.*, fiber optics) to carry traffic.

requirements of local exchange carriers and interexchange carriers for facilities in the TMRS are comparable. Accordingly, we proposed to eliminate the precedence accorded wireline carriers and to remove the "frequency fence."[5] In the *Notice*, we reiterated that the underlying purpose of the TMRS, first expressed in 1958, remains valid, *i.e.*, facilities in this service are used to allow communications common carriers to increase the efficiency with which they can construct, maintain, repair and operate their basic transmission facilities. We also noted that the concept of "basic transmission facilities" includes the provision of both local exchange and interexchange (long distance) service.[6]

5. The existence of the frequency fence also raised issues concerning AT&T's eligibility for the exclusive wireline frequencies in the TMRS. In the post-divestiture environment, AT&T is no longer a provider of local exchange telephone service. The provision of this local exchange service formed the basis of AT&T's eligibility for the wireline carrier frequencies. Therefore, retention of the division of frequencies between wireline and microwave carriers would require either a rule waiver for AT&T, the grandfathering of AT&T's existing authorizations or the relocation of its operations to the frequencies available to the microwave carriers.[7] Our proposal to remove the frequency fence would obviate any need to dislocate the TMRS operations of AT&T or any other TMRS licensee.

6. Another issue addressed in the *Notice* was the use of TMRS frequencies for providing customer premises equipment (CPE) and enhanced service offerings. In the *Notice*, we observed that these offerings are no longer common carrier functions and that the use of TMRS frequencies for their installation and maintenance is not an appropriate use of TMRS facilities. However, this distinction,

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[5] "Frequency fence" is the term commonly used to refer to the division of frequencies in the TMRS between the wireline carriers, who have exclusive access to the frequencies mentioned in para. 3, *supra*, and the microwave carriers, who do not have access to these exclusive frequencies.

[6] The Modified Final Judgment (MFJ) in *U.S. v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983) established Local Access and Transport Area (LATA) boundaries to differentiate "exchange" and "interexchange" services for the purposes of the MFJ. The BOCs provide service within the LATAs (intra-LATA), and interexchange carriers, including AT&T, provide service between the LATAs (inter-LATA). Notwithstanding this, we observed in the *Notice*, at para. 28, that many BOCs traditionally identified only with local exchange service also provide interexchange service to the extent they have intra-LATA interexchange responsibilities.

[7] AT&T is eligible for the microwave carrier frequencies based on its Part 21 authorizations in the Point-to-Point Microwave Radio Service.

if applied to communications common carriers who provide CPE and enhanced services, could result in the need for redundant communications systems, one to serve the common carrier functions and one for CPE/enhanced service functions. We were concerned that common carriers who employ common equipment in the maintenance of both their basic transmission facilities and their CPE/enhanced service offerings should not have to establish separate radio facilities merely to meet the requirements of the TMRS eligibility rule. Therefore, we proposed in the *Notice* to apply the principles enunciated in our Report and Order in the *Permissible Communications* proceeding.[8] Under this approach, we would permit the use of TMRS facilities to maintain CPE and enhanced service offerings when a TMRS eligible uses common equipment to maintain both its basic transmission facilities and CPE/enhanced offerings.

7. Comments and reply comments in response to the *Notice* were submitted by the following parties:

Comments

Central Committee on Telecommunications of the American Petroleum Institute (API)
American Telephone and Telegraph Company (AT&T)
BellSouth Corporation (BellSouth)
Independent Data Communications Manufacturers Association (IDCMA)
MCI Telecommunications Corporation (MCI)
Manufacturers Radio Frequency Advisory Committee (MRFAC)
National Telephone Cooperative Association and Organization for the Protection and Advancement of Small Telephone Companies (NTCA/OPASTCO filing jointly)
Southwestern Bell Telephone Company (Southwestern Bell)
United States Telephone Association (USTA)

[8] PR Docket No. 84-109, *Amendment of Part 90 of the Commission's Rules and Regulations to Eliminate the Permissible Communications Restrictions in the Private Land Mobile Radio Services*, FCC 85-27, released January 31, 1985, 50 Fed. Reg. 6179 (February 14, 1985). In this *Report and Order*, we relaxed the permissible communications rules as they pertained to operations on exclusive channel assignments in the private land mobile radio services. While we did not alter the permissible communications rules as they pertained to operations on shared channel assignments (such as operations in the bands below 470 MHz in the TMRS), we did remove certain restrictions that applied to the TMRS and the Special Industrial Radio Service. These restrictions would have required an eligible to construct duplicate radio facilities merely to conduct certain business activities that were incidental to the activities which established the licensee's eligibility. *See Report and Order*, PR Docket No. 84-109, paras. 7-8.

Reply Comments

AT&T
MRFAC
Southwestern Bell
USTA

Discussion and Decision

Division of Frequencies

8. API, AT&T, MCI and MRFAC support our proposal to remove the division of frequencies and to make all the VHF and UHF frequencies allocated to the TMRS available to all TMRS eligibles equally. USTA, the national trade association for local exchange telephone companies, urges us not to remove the fence until pending proposals to increase the spectrum available for the private land mobile radio services are implemented.[9] USTA believes that eliminating the fence would only aggravate existing congestion on TMRS frequencies in large metropolitan areas. NTCA/OPASTCO agrees that the distinction between wireline carriers and microwave carriers is no longer valid. However, NTCA/OPASTCO asserts the more appropriate distinction should be between local exchange carriers, who would have access to the wireline frequencies, and interexchange carriers, who would have access to the microwave frequencies. They believe some sort of frequency fence in the TMRS is necessary to assure that interference between the maintenance and repair activities of local exchange carriers and those of interexchange carriers is minimized.[10]

9. BellSouth and Southwestern Bell support our goal to maximize the use of TMRS frequencies by removing the fence, but they are greatly concerned that increased congestion on TMRS frequencies may lead to the assessment of higher frequency coordination fees by the Telephone Maintenance Frequency Advi-

[9] *See NPRM* in General Docket No. 84-1233, *Amendment of Parts 2, 15 and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 896-902 MHz and 935-941 MHz Band for Private Land Mobile Use*, FCC 84-575, released January 3, 1985, 50 Fed. Reg. 1582 (January 11, 1985); *NPRM* in General Docket No. 85-172, *Further Sharing of the UHF Television Band by Private Land Mobile Radio Services*, FCC 85-289, released June 10, 1985, 50 Fed. Reg. 25587 (June 20, 1985).

[10] Recognizing that there may be instances when the requirements of one class of carrier exceed the number of frequencies available to it in a given geographic area, NTCA/OPASTCO would permit limited access to each other's pools when all frequencies in the applicant's primary pool within 35 miles of the proposed base station are assigned. *See* 47 C.F.R. § 90.81(d)(4) (1985).

sory Committee (TELFAC).[11] BellSouth and Southwestern Bell fear that removal of the fence and increased congestion on TMRS frequencies will require greater care on TELFAC's part in selecting frequencies and, in turn, require TELFAC to increase its engineering staff and pass on these increased frequency coordination costs to TELFAC's users. These two commenters also state their desire to avoid employing relatively uncongested frequencies in the 800 MHz band because of the higher cost of 800 MHz radio equipment and the decreased coverage area afforded by operations in that band compared to the wireline low-band VHF frequencies.

10. BellSouth and Southwestern Bell propose making TELFAC responsible for assigning TMRS frequencies by type of carrier based on a "priority" list.[12] Wireline carriers, microwave carriers and wire-telegraph carriers would each have a "preferred" frequency assignment. According to these commenters, guidelines for prioritizing the assignment of frequencies by type of carrier would assure the orderly assignment of frequencies, ease the workload on TELFAC, reduce frequency coordination costs, and delay the need for TMRS eligibles to employ 800 MHz band frequencies.

11. In general, opposition to removal of the frequency fence is based on concerns that use of the same TMRS frequencies by different types of communications common carriers will result in increased interference. However, we are not persuaded that removal of the fence will lead to greater interference. First, no arguments have been advanced by the commenters to demonstrate that the TMRS operations of different types of carriers are incompatible on the same frequencies. Indeed, it is our experience that licensees in the same radio service usually work together to minimize and resolve interference problems. Second, we remain confident that the frequency coordination activities of TELFAC can take into consideration the particular operational requirements of individual TMRS applicants and make a frequency selection that meets the needs of the applicant and does not degrade the operations of co-channel licensees. With or without additional allocations of spectrum to the private land mobile radio

[11] TELFAC is the Commission-certified organization responsible for frequency coordination activities in the TMRS. For a full discussion of the frequency coordination process in the private land mobile radio services, *see Report and Order*, PR Docket No. 83-737, FCC 86-143, released April 15, 1986.

[12] Under the BellSouth/Southwestern Bell plan, microwave carriers would be assigned, as a first choice, to 451.325 MHz — the frequency which accounts for 85 percent of base station, repeater and mobile TMRS frequencies authorized to AT&T. (Southwestern Bell *Comments*, pp. 4-5). These guidelines would effectively implement the proposal advanced by the BOCs at the Inquiry stage of this proceeding. *See Notice*, para. 13.

services, we are confident that, with the efficient, effective coordination of TMRS frequencies by TELFAC, removal of the frequency fence will not result in any appreciable degradation of the quality of service.

12. BellSouth and Southwestern Bell urge the adoption of frequency selection guidelines by TELFAC that would maintain a frequency fence. It is our experience, however, that the sharing of a limited number of channels among similar users optimizes the efficient use of the spectrum.[13] Considering the small number of frequencies involved (4 VHF frequencies and six UHF frequency pairs), we have evry expectation that the sharing of these channels within the same radio service will optimize the use of these frequencies.

13. BellSouth and Southwestern Bell would have TELFAC base its frequency recommendations on the priorities attached to different categories of users. While they do not specifically state whether these priorities should be imposed by the Commission, we have recently rejected suggestions that we impose frequency assignment methodologies on coordinators. In our recently adopted *Report and Order* addressing frequency coordination in the private land mobile radio services, we recognized that many variables go into the frequency coordination process and that rigid frequency assignment methodologies are not desirable.[14] Having certified TELFAC as the coordinator for the TMRS, we are confident TELFAC can select frequencies for applicants without having to adhere to a reconstituted frequency fence. Further, the commenters concerns regarding increased costs in the absence of frequency assignment guidelines are speculative. We do not believe it would be in the public interest to maintain the fence arbitrarily dividing TMRS frequencies based on either speculation that the cost of performing frequency coordination may rise or the commenters' unwillingness to employ more costly equipment utilizing the less-congested 800 MHz band.

Use of the Shared 450-470 MHz Frequencies

14. In 1974, when eligibility in the TMRS was expanded to include microwave carriers authorized under Part 21, the fre-

[13] *See Report and Order*, PR Docket No. 84-370, *Amendment of Part 90 of the Commission's Rules concerning the sharing of two Police Radio Service frequency pairs with eligibles in the Fire and Special Emergency Radio Services*, FCC 84-619, released December 13, 1984, 49 Fed. Reg. 49637 (December 21, 1984.)

[14] *See* note 11, *supra.*

quency fence was established to separate the microwave carriers from the wireline carriers. Because the microwave carriers did not have access to these exclusive frequencies, the Commission gave them direct access to the twelve 450–470 MHz band frequency pairs shared by the Power, Petroleum, Forest Products, Manufacturers and Telephone Maintenance Radio Services. *See* 47 C.F.R. § 90.81(d)(4). With the exception of the microwave carriers, assignments are made on these frequencies only when all of the base and mobile frequencies in the 450–470 MHz band for which the applicant is primarily eligible are assigned within 35 miles of the proposed base station.[15] One of the consequences of our proposal to remove the frequency fence was that all TMRS eligibles would gain direct access to these twelve UHF frequency pairs in the 450–470 MHz band.[16]

15. API and MRFAC note that with removal of the frequency fence, all TMRS eligibles, including the Part 21 microwave carriers, would be able to use the six exclusive TMRS frequency pairs in the 450–470 MHz band, as well as the two low-band VHF frequencies and two high-band VHF frequencies allocated exclusively to the TMRS. These parties point out that the rule set forth in the Appendix to the *Notice* would convert this pool of twelve frequency pairs in the 450–470 Mhz band that has been traditionally shared among the five services into what would become in effect a primary TMRS allocation, with the four other radio services relegated to secondary status. They urge us to reinstate the original regulatory scheme whereby all five services had access to the shared channel pairs only when their primary 450–470 MHz band frequencies were exhausted in the proposed area of operation. API states:

> Adoption of the proposed amendment would result in disproportionate use of the channel by TMRS licensees, inasmuch as they alone would *not* be required to demonstrate that other 450–470 Mhz channels, allocated

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[15] Frequencies that must first be exhausted by the eligibles in these services are found in § 90.63(d)(15) for the Power Radio Service; § 90.65(c)(28) for the Petroleum Radio Service; § 90.67(c)(18) for the Forest Products Radio Service; § 90.79(d)(13) for the Manufacturers Radio Service; and § 90.81(d)(1) for the Telephone Maintenance Radio Service.

[16] The Appendix to our *Notice* proposed revising § 90.81(d)(4) to read as follows:

> This frequency is available on a shared basis in the Power, Petroleum, Forest Products, Manufacturers, and Telephone Maintenance Radio Services. Except for assignments made to eligibles authorized in the Telephone Maintenance Radio Service, it may be assigned only when all of the base and mobile frequencies in the 450–470 MHz band for which the applicant is primarily eligible are assigned within 35 miles (56 km) of the proposed base station. Applications for this frequency must be coordinated with all five services.

> exclusively to the TMRS, are employed within 35 miles of the proposed station operation. If the Commission removes the frequency fence it created in 1974, it should also eliminate the limited exception originally inserted at § 90.81 for the benefit of non-wireline carriers. Access to the shared UHF channels should be on an equal basis for all Part 90 eligibles permitted to employ those frequency assignments. (API *Comments*, p. 8.)

16. Only AT&T and Southwestern Bell's comments support the proposal to allow TMRS eligibles to use freely the twelve shared 450-470 MHz band frequencies.[17] AT&T believes the microwave carriers now operating on the shared frequencies will have a strong incentive to move to the exclusive TMRS frequencies and away from these frequencies which they now must share with the other four private land mobile radio services. AT&T further notes that since all use of the shared pool frequencies must be coordinated with all five radio services, TELFAC's frequency coordination activity will assure that the needs of all prospective users of the pool are accommodated in a fair and impartial manner.

17. We agree with API and MRFAC that with removal of the frequency fence there is no longer any rationale for according priority status to microwave carriers on the twelve shared frequency pairs. We also agree with MRFAC's observation that it would be unfair to convert a pool of frequencies shared among five services into a primary TMRS allocation. Accordingly, we are amending the rule specifying the frequencies available to the TMRS to require TMRS applicants who request facilities on the twelve shared UHF frequency pairs to first demonstrate that no primary TMRS frequencies in the 450-470 MHz band are available in the proposed area of operation. We will allow any TMRS eligible now operating on the twelve shared 450-470 MHz frequency pairs to renew its authorizations indefinitely and also to expand its existing systems.

Use of TMRS Frequencies for Activities Involving CPE and Enhanced Service Offerings

18. All parties to this proceeding agree that expanding TMRS eligibility to the growing number of businesses that sell and service terminal and other specialized communications equipment

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[17] In support of extending primary status to TMRS eligibles, Southwestern Bell states that the Power, Petroleum, Forest Products, and Manufacturers Radio Services have access to exclusive frequency allocations that are not available to TMRS users. (Southwestern Bell *Reply Comments*, p. 4). While this is true, TMRS users have access to exclusive frequency allocations that are not available to the other private land mobile radio services. *See* para. 3, *supra*.

would present the TMRS with severe frequency congestion problems in the larger urban areas as well as undermine the purpose of the TMRS. All commenters note that facilities in the Business Radio Service and the Specialized Mobile Radio Service are available to meet the internal communications requirements of these terminal equipment vendors.

19. Commenters had differing perspectives on our proposal to permit an existing TMRS eligible to use its TMRS facilities to maintain CPE and enhanced service offerings when the eligible uses common equipment (e.g., same utility trucks equipped with two-way radio) to maintain both its basic transmission facilities and CPE/enhanced offerings.[18]

20. API was sensitive to our concern that no TMRS eligible be required to construct a duplicate radio system to handle the installation and maintenance of CPE/enhanced service offerings solely to meet the requirements of the TMRS eligibility rule.[19] However, fearing congestion on frequencies shared with other Part 90 users, API would have TMRS eligibles proposing to use common equipment demonstrate to the Commission that it would be impractical to maintain separate radio facilities for servicing transmission facilities and CPE/enhanced services. Additionally, API urges us to evaluate carefully the representations of common equipment users in order to determine the extent to which the same or different personnel perform transmission facility and CPE/enhanced maintenance functions. Believing the common equipment test insufficient, API would have us require that CPE/enhanced operations be handled outside the TMRS if it is determined that maintenance of both functions was being handled

[18] We did not anticipate that the use of TMRS facilities for the installation and maintenance of CPE and enhanced service offerings would be extensive. The *Notice* stated, at para. 25, that our primary concern was that any prohibition on using the TMRS for the incidental maintenance of CPE/enhanced offerings would severely affect small local exchange telephone companies who employ common equipment. Because of differences involving the size and type of equipment used to maintain CPE/enhanced offerings and basic transmission facilities (large, heavy-duty utility trucks for transmission facilities maintenance, light-duty trucks and vans for CPE/enhanced maintenance), and because of the privacy considerations discussed in para. 28, *infra*, we do not believe the use of TMRS facilities to maintain both functions will be extensive.

[19] 47 C.F.R. § 90.81(b) reads: "*Special limitations on use.* The facilities authorized in this service shall only be used for transmission of communications directly related to the construction, repair, maintenance or operation of communications common carrier facilities. The facilities authorized in this service shall not be used for the transmission of any common carrier or public correspondence communication."

by different employees within a corporation.

21. NTCA/OPASTCO support our common equipment test, arguing that it would remove a significant cost burden from those small and rural exchange carriers who, by necessity, employ common equipment and personnel for all maintenance functions. BellSouth supports the common equipment test, assuming that such use of TMRS frequencies would occur outside major metropolitan areas.[20] Conversely, Southwestern Bell supports our proposal, assuming TMRS eligibles would use TMRS facilities for both functions primarily in major metropolitan areas.

22. AT&T and MCI urge us to expand the ability of TMRS licensees to use their systems for maintenance of CPE and enhanced service offerings. MCI believes that all TMRS eligibles should be permitted to use their systems for the maintenance of CPE and enhanced services as an adjunct of the transmission facilities maintenance activitiy that forms the basis of their eligibility. AT&T states that if we adopt the common equipment test, then all TMRS eligibles, including AT&T, should have the right to take advantage of it.[21] AT&T further requests that we make the common equipment test encompass both the TMRS eligible and its affiliates who supply CPE/enhanced services.[22] According to AT&T, the use of common equipment for maintaining both transmission facilities and CPE/enhanced services affords opportunities for cost savings whether those functions are performed by a single company or by affiliates of the TMRS eligible. Thus, in AT&T's view, the TMRS rule should not preclude the sharing of common equipment with affiliates.

23. IDCMA, an association of companies that manufacture CPE and computer communications equipment, expresses concern that the *Notice* would confer a competitive advantage on a TMRS licensee permitted to use the TMRS for CPE-related activities.[23]

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[20] We expect that most use of TMRS facilities for both transmission line maintenance and CPE/enhanced services maintenance will occur outside of major metropolitan areas where smaller exchange carriers have one maintenance fleet for all functions.

[21] NTCA/OPASTCO would limit the benefits of the common equipment test to exchange carriers and small or rural telephone companies. (NTCA/OPASTCO *Comments*, pp. 6-7.)

[22] AT&T Communications (ATTCom), a subsidiary of AT&T, is the TMRS eligible owning transmission facilities. AT&T-Information Systems (ATTIS), another subsidiary of AT&T, and hence, an affiliate of ATTCom, is the AT&T entity that provides CPE/enhanced services. Our *Notice* did not propose expanding TMRS eligibility to entities like ATTIS. For a fuller discussion of the relationship between subsidiaries and affiliates, *see Notice*, note 23.

[23] IDCMA sees this competitive advantage arising from our action in PR Docket No. 84-109 (*see* note 8, *supra*) where we allowed TMRS licensees to use their

IDCMA would have us extend TMRS eligibility to *all* CPE providers, both common carriers and non-carriers alike. Alternatively, IDCMA would require that all communications regarding CPE activities be restricted to the Business Radio Service.[24] Finally, if we decide to permit some use of TMRS frequencies for CPE-related activities, IDCMA would have us limit such use to "very small carriers" or for limited emergency or national security purposes.[25]

24. IDCMA also fears that allowing those common carriers who meet the common equipment test to use the TMRS for CPE maintenance would unintentionally create an incentive for carriers who have voluntarily adopted some form of structural separation between their regulated and competitive activities to reintegrate them. Along these lines, IDCMA fears that Commission proceedings concerning the reintegration of regulated and unregulated offerings may lead to far greater use of TMRS spectrum for communications unrelated to the provision of basic transmission services.[26]

TMRS facilities for sales and administrative communications. *See Report and Order*, PR Docket No. 84-109, para. 8.

[24] IDCMA sees a competitive advantage being given to communications common carriers by virtue of the TMRS eligibility rule. IDCMA goes on to state:

> Under the Commission's CPE proposal, eligible carriers with TMRS allocations would in effect be guaranteed spectrum which they could use for both their telephone maintenance and CPE maintenance activities. By contrast, non-carrier CPE vendors would have to compete with other businesses for scarce spectrum in the Business Radio Service or other radio services. This would impose one more burden on non-common carrier CPE vendors and confer yet another unnecessary benefit on certain common carriers. (IDCMA *Comments*, p. 5.)

[25] IDCMA is concerned that our *Notice* would permit extremely large companies, such as AT&T and the BOCs, to use TMRS spectrum for CPE-related activities. To avoid this, IDCMA urges us to include specific language in the TMRS rule (§ 90.81) to define the size of the companies eligible to use TMRS spectrum for CPE-related activities. (*See* IDCMA *Comments*, p. 12).

[26] These proceedings include the *Order* in CC Docket No. 85-26, *Furnishing of Customers Premises Equipment and Enhanced Services by AT&T*, 102 FCC 2d 655 (1985) (*AT&T Structural Relief Order*), where AT&T is permitted to provide CPE free of the structural separation requirements established in the *Second Computer Inquiry*, but subject to certain nonstructural safeguards designed to prevent potential anticompetitive activity. The other proceeding of concern to IDCMA is the Commission's *Third Computer Inquiry*. In the *Report and Order* in CC Docket No. 85-229, FCC 86-252 (released June 16, 1986) (*Computer III Order*), the Commission permitted AT&T and the BOCs to provide enhanced services subject to nonstructural safeguards rather than structural separation. Additionally, we direct attention to the *Notice of Proposed Rule Making* in CC Docket No. 86-79, *Provision of Customer Premises Equipment by the Bell Operating Telephone Companies*, FCC 86-113 (released March 28, 1986) (*BOC Structural Relief Notice*), where the Commission proposes replacing structural separation for BOC provision of CPE with nonstructural safeguards.

25. Our purpose in proposing the common equipment test was to apply a reasonably simple standard to assure that no TMRS eligible had to construct duplicate radio facilities in the event it also undertook maintenance of CPE/enhanced service offerings. We agree with API and the other commenters who believe that assignments in the TMRS should not be made available for use by businesses strictly engaged in the installation and maintenance of CPE and enhanced service offerings. However, we do not agree with API that the common equipment test is insufficient or that we must give extraordinary scrutiny to the representations of common equipment users. First, our experience has been that with few exceptions, applicants' representations are very reliable. There is no reason to expect a significantly different result in this situation. Second, because of the small size of the TMRS relative to the four other private land mobile services that share frequencies with the TMRS, we do not believe it is likely that permitting TMRS eligibles who meet the common equipment test to employ their facilities on an incidental basis to maintain CPE/enhanced services will lead to congestion of the shared frequency pairs in the 450–470 MHz band.[27]

26. Having carefully reviewed the comments, we are adopting the common equipment test and thus permitting the use of TMRS facilities to maintain CPE and enhanced service offerings when a TMRS eligible uses common equipment to maintain both its basic transmission facilities and CPE/enhanced offerings. We are mindful of the concerns that the use of the TMRS for CPE/enhanced maintenance may lead to frequency congestion, particularly in urban areas. However, we believe the common equipment test strikes a careful balance: no TMRS licensee is required to incur unnecessary costs constructing a duplicate radio system, while, at the same time preserving the underlying purpose of the TMRS—the maintenance of basic transmission facilities.

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[27] A review of the Commission's license data base reveals that the TMRS is the smallest of the five services that share the twelve frequency pairs in the 450–470 MHz band. Our decision here to allow equal access by private land mobile radio service eligibles sharing these frequencies should do nothing to disrupt the current licensing pattern. The table below indicates the average number of base stations and mobile units operating on these frequencies in each service.

	Tel.Maint.	*Power*	*Petroleum*	*For.Prd.*	*Manuf.*
Base stations	33	140	100	18	36
Mobiles	649	20,160	3,586	1,203	972

27. Addressing AT&T's concerns regarding sharing of equipment between affiliates, we emphasize that AT&T-Information Systems (ATTIS) is not eligible for an authorization in the TMRS. While ATTIS may share equipment (*e.g.*, utility trucks) with its affiliate AT&T Communications, any use of TMRS facilities for CPE/enhanced services maintenance would have to be accomplished under the control of AT&T Communications, the TMRS eligible owning transmission facilities, and within the guidelines set forth pursuant to further Commission orders on cost accounting and other nonstructural safeguards. These safeguards will of course continue to govern the use of these frequencies by AT&T Communications for CPE/enhanced services maintenance regardless of whether AT&T retains ATTIS as a separate corporate entity. We also emphasize that our decision to allow TMRS eligibles to utilize their systems under the common equipment test for CPE/enhanced services maintenance does not alter in any way the structural separation and nonstructural safeguards as currently applied to the BOCs. Utilization of TMRS frequencies for maintenance of CPE remains prohibited pending the outcome of the BOC Structural Relief proceeding.[28] BOC utilization of this spectrum for enhanced services maintenance must satisfy the conditions for cost accounting set forth by the Commission in related waiver proceedings permitting BOC enhanced services. In addition, our action taken here will be fully subject to the accounting procedures for joint and common costs adopted pursuant to the Notice of Proposed Rule Making in CC Docket No. 86-111, FCC 86-146, released April 17, 1986.

28. We do not view our actions here as disturbing the equilibrium in the TMRS, or changing the TMRS into a dispatch radio service for common carriers who undertake CPE and enhanced service activities. Particularly, we do not believe that IDCMA's fears regarding the future of the TMRS are valid. The use of TMRS frequencies for CPE-related activities when common equipment is used for maintenance of both transmission facilities and CPE/enhanced offerings should not result in a competitive advantage to common carriers of such proportions that the carriers will ultimately be motivated to reintegrate their regulated and unregulated activities. We find merit in USTA's statement:

> Suffice it to say that there is nothing in the record to indicate that the advantages of use of TMRS frequencies over Business Radio frequencies are significant enough to create this great advantage or encouragement,

[28] *Supra* note 26.

> especially relative to the other costs of doing business. Rather, allowing the limited use of TMRS frequencies simply does not force companies to buy a second radio system for an occasional need. The requirement that CPE-related uses be "incidental" to the primary common-carrier-facilities-related uses is sufficient to protect against any abuse or detrimental misuse of the TMRS frequencies. [Footnote omitted.] (USTA *Reply Comments*, p. 2.)

Southwestern Bell observes that it is unlikely that TMRS frequencies would be used extensively for CPE installation and maintenance. The shared nature of the frequencies and lack of communications privacy discourages the use of these frequencies for the transmission of competitive information, according to Southwestern Bell.[29]

Miscellaneous

29. USTA urges us to clarify that the revised § 90.81 appearing in the *Notice* does not extend TMRS eligibility to pure resellers who do not own basic transmission facilities. USTA acknowledges that our *Notice* did not propose extending eligibility to such resellers. Nevertheless, USTA urges us to add a "facilities-based" qualification to the first sentence of § 90.81(a), or alternatively, add a sentence at the end of § 90.81(a) stating that pure resellers that do not own or control basic transmission facilities are not eligible to hold authorizations in the TMRS.[30] Because resellers may be communications common carriers, we are adding a provision to the TMRS rule to specify that resellers that do not own or control transmission facilities are not eligible in the TMRS. This modification is necessary in order to preserve the basis of the TMRS, which is the use of private land mobile communications systems to maintain communications common carrier facilities.

30. We note also that there were no objections to our proposal to redefine TMRS eligibility in terms of landline local exchange telephone, interexchange communications service, wire-telegraph service, and radio communications common carriers authorized under Part 21. In the *Notice*, we explained that the Part 90 definition of wireline carrier should conform to the Part 22

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[29] We further note that the nonstructural safeguards adopted in the *AT&T Structural Relief Order* and the *Computer III Order*, *supra* note 26, and proposed in the *BOC Structural Relief Notice*, *supra*, note 26, are specifically designed to control potential anticompetitive activities of AT&T and the BOCs in the provision of enhanced services and CPE.

[30] Southwestern Bell concurs with USTA that pure resellers should not be permitted to use TMRS frequencies. (Southwestern Bell *Reply Comments*, p. 2.)

definition, and that we included the phrase "provision of landline local exchange telephone service" in the TMRS rule in order to differentiate eligibility with respect to radio common carriers authorized under Part 22, who are excluded from TMRS eligibility.[31]

Final Regulatory Flexibility Analysis

31. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

Objective for this Action: The Commission is revising the rule governing the Telephone Maintenance Radio Service so that it conforms to the post-divestiture structure of the telephone industry. This action also enhances the utilization of the existing TMRS frequency allocation, obviates the need to dislocate the operations of any TMRS licensee, and removes the need for TMRS licensees who employ common equipment for maintenance of both basic transmission facilities and CPE/enhanced offerings to construct duplicate radio systems solely to meet the requirements of the TMRS rule.

Legal Basis: This amendment of the TMRS rule is authorized pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, which authorizes the Commission to make such rules and regulations as may be necessary.

Description, Potential Impact and Number of Small Entities Affected: The *Notice* in this proceeding specifically requested comments on the economic impact changes in the TMRS rule might have on smaller independent telephone companies and rural telephone companies and cooperatives. NTCA/OPASTCO, national organizations representing small and rural exchange carriers, restate the comments they jointly made in response to our *Inquiry* which urge the retention of the frequency fence. NTCA/OPASTCO did not provide estimates of the number of carriers affected and the scope of the potential impact. NTCA/OPASTCO also express concern that any prohibition on using TMRS facilities to install and maintain CPE/enhanced services would affect their member organizations that use common equipment and personnel to maintain both their basic transmission facilities and CPE/enhanced facilities.

Reporting, Recordkeeping, and Other Compliance Requirements: The rule amendment set forth here has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to

[31] *See Notice*, para. 35.

contain no new or modified form, information collection and/or recordkeeping, labelling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public. Additionally, no new compliance requirements are being promulgated.

Federal Rules Which Overlap, Duplicate or Conflict With This Rule: None.

Significant Alternatives: Significant alternatives to our rule amendment that will permit TMRS eligibles who use common equipment for maintenance of both basic transmission facilities and CPE/enhanced services to use TMRS facilities for both functions were contemplated and dismissed. Among the reasons for adopting the rule promulgated here was the adverse impact that prohibiting use of the TMRS for CPE/enhanced services would have on small exchange carriers who use common equipment for both functions. In regard to our rule amendment that removes the frequency fence, we considered, and declined, to retain the frequency fence. For reasons discussed at paragraphs 8–13, *supra*, we believe that operation of the frequency coordination mechanism can best meet the needs of TMRS applicants, including the small exchange carriers represented by NTCA/OPASTCO, without degrading the operations of co-channel licensees.

Ordering Clauses

32. Accordingly, IT IS ORDERED, that effective September 26, 1986, Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in the attached Appendix. Authority for this action is found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

33. For further information on this proceeding, contact Harold Salters of the Land Mobile and Microwave Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 632–7597.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 — PRIVATE LAND MOBILE RADIO SERVICES

Subpart D — Industrial Radio Services

1. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. § 90.81 is amended to read as follows, and all references to Limitation 1 are removed from the Table at paragraph (c).

§ 90.81 Telephone Maintenance Radio Service.

(a) *Eligibility.* Communications common carriers engaged in the provision of landline local exchange telephone service, or interexchange communications service, or who provide wire-telegraph service, and radio communications common carriers authorized in the Point-to-Point Microwave Radio Service under Part 21 of this chapter are eligible to hold authorizations in the Telephone Maintenance Radio Service. Resellers that do not own or control transmission facilities are not eligible in this service.

* * * * *

(d) * * *

(1) [Reserved].

* * * * *

(4) This frequency is available on a shared basis in the Power, Petroleum, Forest Products, Manufacturers, and Telephone Maintenance Radio Services. It may be assigned only when all of the base and mobile frequencies in the 450–470 Mhz band for which the applicant is primarily eligible are assigned within 35 miles (56 km) of the proposed base station. Applications for this frequency must be coordinated with all five services. Telephone Maintenance Radio Service licensees on this frequency authorized prior to [effective date of Report and Order], including their successors or assigns in business, will be permitted to renew their authorizations indefinitely, increase the number of transmitters operated, and expand the geographic coverage area of their systems, without a showing that all of the base and mobile Telephone Maintenance Radio Service frequencies in this band are assigned within 35 miles (56 km) of the existing base station.

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Automatic Program Identification Service
Identification Automatic System

Notice of Proposed Rulemaking and Notice of Inquiry adopted to establish a means by which all radio emissions might be encoded with a distinct automatically transmitted identifier.

—*Automatic Transmitter I.D. System*
Gen. Docket No. 86-337

FCC 86-356

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of	
An Automatic Transmitter Identification System for Radio Transmitting Equipment	General Docket No. 86-337

NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY

Adopted: August 7, 1986; Released: August 19, 1986

BY THE COMMISSION:

INTRODUCTION

1. The Commission institutes this proceeding to establish a means by which all radio emissions might be encoded with a distinct automatically transmitted identifier. For video satellite uplink stations regulated under Part 25, we are proposing rules. For all other services we seek comments on how to proceed.

BACKGROUND

2. An automatic transmitter identification system (ATIS) for all radio communication devices would benefit orderly management of the spectrum. For purposes of this Docket, ATIS is a unique, unchangeable identifying number assigned to each transmitter at time of manufacture plus some correlation of the number to a data base identifying the licensee, such as a call letter list. This

information is automatically modulated onto the unit's transmission. It is a "signature" providing positive identification of each radiated signal.

3. Expanded technologies, spectrum crowding, more critical radio uses, readily available multi-channel equipment, smaller regulatory budgets, and other reasons make it increasingly difficult to satisfactorily resolve radio interference problems. For example, in the past few years there have been several acts of deliberate interference to aviation communications in alleged retaliation for employer disputes. Aviation Emergency Locator Transmitters exhibit a 97% false activation rate with resulting searches. On a frequent basis, unintentional, as well as intentional, jamming occurs on the marine distress and Bridge-to-Bridge frequencies. Also, hundreds of false distress maydays are transmitted each year. These are illustrative of just a few safety-related radio interference problems where ATIS could have a significant impact. Of course there are many more non-safety related interference problems such as amateur repeater jamming, groups of pilots engaging in "CB" type conversations on aviation channels, broadcast electronic news gathering equipment suddenly causing disruptions and the proximity problems with electronic home entertainment equipment.

4. Deliberate disruptions of radio communications have even spread to satellite transmissions. An individual using the pseudonym "Captain Midnight" captured and displayed his message through a satellite transponder by overpowering the legitimate transmission on the transponder. United States Representative, Timothy E. Wirth, Chairman, Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce, has indicated that this act represented "a major potential threat to the nation's entire communications system." Congressman Wirth further requested that the Commission "initiate a proceeding at the earliest possible date in order to explore fully the feasibility and desirability of developing a detection system based upon the encoding of satellite transmission equipment or other practical detection methods." This recommendation was in agreement with the industry produced Phase II Final Report of the FCC Advisory Committee on Reduced Orbital Spacing.

5. Technical and operational reasons necessitate an ATIS system. For example, a fast food chain of restaurants, using two way radio headsets in its operations, finds it administratively impossible for its employees to utilize the verbal call sign because

of confusion to the customers and a busy operational environment. Similarly, some station operators in the construction industry, such as a crane operator, are often, out of necessity, so preoccupied with the critical performance requirements of their jobs that they are reluctant to disrupt their concentration to identify. There are also many telemetry-only systems where voice is simply not compatible.

6. The concept of ATIS is not new or untried. Many operational systems utilize a form of automatic transmitter identification for their own requirements. These systems demonstrate the ability of ATIS to adapt to a wide range of communication systems and needs. ATIS takes the present station identification requirements and applies them in automatic fashion. The need for transmitting call letters is well established by present rules. By employing ATIS the transmission of a call sign/identification number will be included with each message without personal intervention by the operator. It is automation of an existing function and an increase in reliability.

7. Over 10 years ago in Docket 20351, the Commission released a Notice of Proposed Rule Making looking toward adoption of an ATIS requirement. Many of the comments at that time focused on deficiencies of the rigidly proposed system because it was incompatible with certain specific systems, it increased channel occupancy, or it was economically unsound. We believe these objections are technically resolved or resolvable at this time.

EXISTING ATIS SYSTEMS

8. As a spectrum manager, the Commission has a responsibility to encourage orderly development of communication technology. Sharing of frequencies is necessary for the fullest utilization of the radio spectrum. The rules that recognize this may entail the acceptance of some interference but do not contemplate the acceptance of harmful interference. With regard to ATIS, an endorsed preferred identification code will encourage compatability, provide a universal recognition, provide economy of scale, and provide an immediate design criterion. While a single identification code is preferable, we recognize that no single code scheme will function in all situations. There are also a number of existing pseudo-automatic identification systems that seem acceptable. For example, the following coding techniques each provide a unique identifier:

1) Marine Selective Calling System for International Use (Appendix 39 of the ITU Radio Regulations). Each mobile marine station is assigned a unique five-digit selective call signal. The identifier is transmitted via a series of distinct audio tones. Each digit from 0 to 9 is represented by an assigned specific audio tone. Timing and tolerance are also specified.

2) Marine Digital Selective Calling for International Use (CCIR Recommendation 493-3). Each mobile marine station is assigned a unique numerical or alphanumerical identifier that is incorporated into a designated location of the call sequence format. It is automatically included as part of each digital transmission. The system is a synchronous 10-unit error detecting code.

3) 406 MHz ELT/EPIRB Beacons for the Future COSPAS-SARSAT Network. Each ELT/EPIRB is assigned a unique identification code that is specified in location in the digital transmission format. It is currently based on the BCH Code.

4) Land Mobile Cellular Systems. Each mobile unit has a unique factory-set serial number and a distinct 10 digit telephone number that are digitally transmitted. It is based on the BCH Code.

BENEFITS OF ATIS

9. A review of rulemakings in the last 10 years discloses a constant chipping away of the basic station identification rules based on unique circumstances, undue hardship, and "lack of interference" considerations. The dilution has been substantial, but indeed necessary. Conventional identification has not been possible with many technologies, but ATIS will allow more flexibility and greater acceptance. The obvious immediate benefit of ATIS is to interference resolution where the first step is always to identify the stations involved. It will provide a distinct "signature" on the transmissions of both unintentionally and deliberately involved stations. Under ideal operating practices the announcement of a call sign would provide this identification for the unintentionally involved station in many services, but our experience shows that in services where identification is required, many transmissions are made without call sign identity. For example, 25% or more of the voice transmissions of Private Land Mobile Radio Service stations are unidentified. There are also services where identification is not required such as telemetry, satellite, Citizens Band, and low power communication devices. Almost all "voice system" users want alternatives to the assigned call sign. Indeed, CB was famous for millions of colorful pseudonyms such as Tinkerbell, 007, Fun Radio, Rescue 1, and so forth, none of which from our point of view had utility as station identification. An automatic identification system will also be

effective against common daily co-channel interference problems such as the "stuck" microphone, the inadvertently keyed transmitter, and satellite double illumination.

10. Frequency coordinators could utilize ATIS to assist in determining usage, propagation range, unauthorized users, and resolving interference problems and more. ATIS could provide the ability to develop automated monitoring systems that could capture the information instead of using present labor intensive collection methods. With Commission reliance increasingly placed on coordinators, they could develop enhanced capability through ATIS.

11. When all systems are automatically identified, it may be possible to relax some present regulatory cautions, for example, new technologies such as spread spectrum devices, voice privacy, and other digital techniques. Synthesized multi-channel transceivers make it so easy to select a new frequency that some owners of the equipment are tempted to, and do, operate on unauthorized channels to the detriment of others. If synthesized transceivers were equipped with ATIS, the operator would have an incentive not to misuse the built-in channel flexibility since his identity would immediately be known. The utilization of ATIS may help with resolving problems that have arisen with multi-channel synthesized equipment. Similarly, it will speed decisions on requests for new emissions and technical advances since any resulting interference will always be immediately traceable to the transmission source.

12. Indeed, an intangible benefit stems from the user's knowledge that each transmission is identifiable. The present ability to hide behind the mask of anonymity will be gone and the tide of problems stemming from indifference, callous acts or even deliberate and wanton actions will be contained and turned back. Perhaps not a panacea by itself, but a universal constant like the automobile license tag—it is traceable everywhere in the world.

13. An automatic identification would also negate the necessity for call sign identification of stations operating above 30 MHz. We believe ATIS takes the place of existing voice identification requirements. It should pose no problems internationally, by meeting the broad provisions of the ITU regulations[1] and

[1] Article 19, Section 2, for example, states:

"A station shall be identified by a call sign or other recognizable means of identification. Such recognized means of identification may be one or more of the following necessary for complete identification: name of station, location of station, operating agency, official registration mark, flight identification

particularly it would suffice when used on transmitters primarily within the United States and employing a widely published format.

14. As already indicated, the user often has an independent need for ATIS. It provides a unique identifier for calling, billing, tracking, theft deterrence, system access, and other functions. Many users have implemented their own coding method and independently developed the new technology. Others will find it convenient to derive supplemental benefits.

15. The Commission itself foresees a supplemental ATIS benefit of automated technical enforcement monitoring. With every signal containing a coded identifier, it will be possible to rapidly scan a group of channels, make technical measurements such as frequency, modulation, bandwidth, and spurious emission suppression, and relate the measurements to a specific identifiable transmitter. These are all interference critical factors. Automation will equate to a large number of transmissions efficiently measured within a short time period and notification given when there is substantial departure from acceptable limits.

PROPOSED ATIS RULES FOR PART 25

16. An ATIS signal is proposed, under Rule Part 25, on all satellite video uplinks. The FCC Advisory Committee on Reduced Orbital Spacing guidelines are herewith proposed as the immediate standard for incorporating into the Rules. The Committee, made up of industry representatives, looked at alternatives and it is their preferred method that is set forth. In our view, there is significant merit to the industry recommendation. The methodology provides a procedure for identification but is somewhat incompatible with our long-term objectives, in that the ATIS signal is produced external to and inserted in the transmitter rather than generated within the transmitter. However, actual

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number, selective call number of signal, selective call identification number of signal, characteristic signal, characteristic of emission or other clearly distinguishing features readily recognizable internationally."

Section 25 is also rather broadly worded:

Sec. 25 (1) Base Stations
— a call sign; or
— the geographical name of the place followed, if necessary, by any other appropriate indication.
(2) Mobile Stations
— a call sign; or
— the identity of the vehicle *or any other appropriate indication.* (Emphasis supplied.)

installation methods may make it very difficult to defeat the ATIS code. The need to move forward immediately with automatic identification on satellite uplinks is urgent because of the proliferation of stations operated by minimally trained personnel, the loosening bonds of station operators, and the agile equipment employed. Double illumination problems are now daily occurrences and with the new secure video transmissions, traditional program content analysis cannot be used to identify an interfering station. We therefore propose to move on the recommendation. This area is even more critical since traditional search methods used to identify and resolve interference sources on terrestrial oriented systems are ineffective on satellite oriented systems. ATIS will provide an effective identifier to help cope with increasing unintentional interference and future "Captain Midnights."

17. The proposal is permissive with regard to variations from the Committee-recommended standard format but any variation must be recognized by the Commission. However, the Committee is explicit in a recommendation for non-secured video uplink transmissions. We propose to incorporate the Committee's recommendations for video in the Rules.

18. All Part 25 regulated video satellite uplinks will be required to include ATIS on their radiated signal after December 31, 1987. In the case of non-secured signals, off-the-shelf equipment is available for inserting the identification. For secured video, the scrambler manufacturers will have to develop the circuitry for inserting the identification. Any system developed must be recognized by the Commission.

NOTICE OF INQUIRY

19. The Commission is interested in comments concerning ATIS for all services and radio transmitting devices. Included are transmissions regulated under Parts 15, 18, 21, 22, 25, 73, 74, 81, 83, 87, 90, 94, 95 and 97.

20. The establishment of ATIS within a service may be useful for both frequency coordination and enforcement purposes. It would also simplify operational procedures to some extent. However, it would impose costs on the users, both for the necessary hardware and the ongoing need to maintain one or more accurate and up-to-date identification codes. Since it is likely that the costs and benefits will vary from service-to-service, we invite comments on the following questions and any related matters.

(a) In what services would ATIS be beneficial? Should it be imposed on all services?

(b) Could ATIS be mandatory in some services and voluntary in others? For example, ATIS may be valuable in the Marine and Aviation services but unnecessary or impractical in the various Industrial Radio Services.

(c) Would it be feasible to permit stations to ignore normal call sign requirements if those stations employed ATIS? Would this work in some services, such as Broadcast Auxiliary but not others? Would this be confusing or would it provide sufficient incentive for all stations to eventually install ATIS?

21. Critical to our public interest analysis of ATIS is an understanding of two factors: the incentives licensees have to adopt adequate identification systems absent our requirements and the relative costs to licensees of such a program. Each of these factors may be closely related to the characteristics of a particular service. For example, licensees have the greatest incentive to avoid creating interference when they expect to be affected by it in some way. These incentives may be strongest, therefore, in services where licensees either pay a fee to access the radio frequency spectrum or are assigned a channel on an exclusive basis. Even in these cases, however, the inability to converge upon a single standard or other factors may act to prevent the initiation of an optimum ATIS. These types of systems often employ automatic identification systems already.

22. In contrast, licensees on shared frequencies have little reason to avoid creating interference since they are unlikely to reap any daily direct benefit from their efforts. Nevertheless, if *all* users on a shared channel adopted some form of automatic identification to control unintentional interference, their aggregate gain might outweigh their collective cost. In this instance, a mandatory ATIS might be better justified because of the less tangible benefit to that service's licensees as a whole. Moreover, a case for government intervention might be made in cases where the existence of *any* interference could be very costly to life and property (e.g., the aviation, marine and public safety services). Even in cases where licensees have little incentive to employ adequate identification methods, however, a government-mandated ATIS program is only in the public interest if its overall benefits outweigh its costs to the economy at large.

23. We request the assistance of interested parties in evaluating the incentives facing licensees in various services and the costs and benefits of various methods of implementing some form of ATIS in some or all services. Any information which may have

a bearing on these two factors in welcomed. We are particularly interested in commenters' views on the following:

a) How much would the retail cost of transmitting equipment increase if all transmitters included an ATIS based on the standards described in the Appendix? How would these cost increases be affected by differences in equipment volume? What would be the expected cost of changing an ATIS code in cases where equipment changed hands?

b) What is the percentage of transmitters which are now utilizing form of ATIS (e.g., digital squelch)? What are the future trends?

c) How effective would an ATIS be in resolving interference other than co-channel (e.g., that due to intermodulation, spurious emissions or audio rectification)? What supplemental uses would ATIS have beyond interference resolution?

d) To what degree would the existence of a mandatory ATIS standard based on the present array of communications services (similar to that described in the Appendix) impede or accelerate the development and implementation of new communications technologies?

e) In the frequency bands allocated to the safety services and on channels shared by many licensees, what percentage of traffic is currently disrupted due to interference which may be reduced or eliminated under an ATIS program?

f) What savings occur in service, maintenance and coordination time in identifying sources and more efficiently disposing of a multitude of spectrum management related problems in contrast with present day methods and by the year 2000 and beyond?

24. If an operational ATIS system, were adopted, the use of industry standard codes and circuits would be encouraged. We believe that it may be beneficial for one or more industry groups to study, make recommendations and outline a preferred ATIS method. Comments and supporting data are requested on the following:

(a) When should identification be transmitted? Would identification at the beginning and end of each transmission and every 10 minutes if prolonged be satisfactory?

(b) Should the signal be capable of being easily recognized and decoded by the FCC and other interested parties?

(c) Should the identification code by unique and have linkage to identify the station? What database could serve as linkage? We have suggested the possibility of utilizing an unregistered, but unique code set by the manufacturer, plus the coded station call sign set by the user or service company.

(d) Should the code be tamper proof from the station operator? How could it be made tamper proof?

(e) Would ATIS be practical for a service such as amateur where there is no equipment authorization requirement or the equipment may even be homemade.

(f) How should the code be structured to minimally impact ongoing transmissions?

(g) Should a single standard code be selected? Should provisions for unique situations be provided?

(h) What type of ATIS system should be employed with specifics on code, keying rate, modulation method, error checking, etc?

(i) Should a prototype system be tested prior to a Notice of Proposed Rulemaking? How should testing, if needed, be arranged?

(j) What time schedule should be used for implementation? Should equipment be grandfathered? How should used equipment be regulated? Would the following schedule be realistic?

(1) Parts 81, 83, 89, 90 and 95—no later than January 1, 1988, for transmitting equipment manufactured after that date, and January 1, 1993, for all transmitting equipment.

(2) Parts 15 (Low Power Communication Devices Only), 21, 22, 25 (including video satellite uplinks with ATIS internal to the transmitter), 74, 94 and 97—subject to this inquiry but no later than January 1, 1993, for new transmitters and January 1, 1998, for all transmitting equipment.

(3) All other radio services not yet within the ATIS requirements (Parts 15, 18 and 73)—no later than January 1, 2000, for all new equipment.

25. The Commission would welcome the formation of industry groups to address the issues. We would be agreeable to extending the comment period for this Inquiry if such groups request an extension and specify a reasonable time schedule for their activity.

26. No single ATIS method is favored at this time but to stimulate comment a possible system is outlined in the APPENDIX of this Notice.

27. *INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS*

I. *Reason for Action*

Radio transmissions continue to increase in volume, complexity and other methods that make identification of radiated

signal difficult and often impossible. Recognizing that the Commission can no longer afford the resources needed for investigations to determine the identity of stations involved in all interference or technical violation problems, we are seeking relief through a user supported system of automatic identification.

II. *Objectives*

The purpose of this Commission action is to develop and implement an effective method of identifying the transmission source of received radio signals.

III. *Legal Basis*

The action taken by this *Notice* is authorized by Sections 4 (i) and (j), 302, 303, and 403 of the Communications Act of 1934, as amended.

IV. *Description, Potential Impact and Number of Small Entities Affected*

This Notice of Proposed Rulemaking outlines a method of automatic transmitter identification for satellite video uplinks. Every operator of a satellite video uplink would be required to purchase and operate a device to insert identification on all transmissions. Approximately 1,000 stations would be involved. Each encoder would cost under $2000. Operating upkeep expenses should be minimal.

V. *Recording, Record Keeping and Other Compliance Requirements*

None mandated

VI. *Federal Rules which Overlap, Duplicate or Conflict with this Rule*

VII. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives*

None

Ex parte Considerations

28. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rule, 47 C.F.R. 1.1231.

29. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commissions' Rules, interested parties may file comments on or before October 20, 1986, and reply comments on or before November 19, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

30. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

31. IT IS ORDERED, That a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

32. Regarding questions on matters covered in this document, contact John Hudak, 202-632-6977.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO

APPENDIX

Part 25 of the Commission's Rules is amended as follows:

Section 25.206 is revised to read as follows:

Section 25.206 Station Identification

The requirement for transmission of station identification is waived for all radio stations licensed under this part with the exception of video satellite uplinks which are addressed under Section 25.308 of these Rules.

Section 25.308 is added to read as follows: Automatic Transmitter Identification System (ATIS).

All video satellite uplink transmissions shall incorporate an automatic transmitter identification system as specified below on all operation after December 31, 1987.

(a) The identification (ID) signal shall not degrade the existing transmission system;

(b) The ID signal injection method shall not produce harmful interference to other existing transmission systems;

(c) Every effort shall be exerted to utilize unclassified technology;

(d) The ID signal shall contain certain information, including owner/operator identification which uniquely identifies the transmitter.

(e) The ID message format may or may not be the same as the existing modulating signal format. For example, in NTSC FM television, the ID may be injected in a vertical line, in digital form, or as a separate SCPC transmission within the transponder passband, or as a multi-line plain language identifier in the vertical blanking interval;

(f) In secured transmission (scrambled or encrypted) the ID signal transmission format shall be such that all ID information may be extracted without the need for a descrambler or decryptor. ATIS methods for secured transmissions

must be submitted to and recognized by the Commission;

(g) The ID generation equipment shall easily interface with existing uplink equipment;

(h) Seven-bit ASCII is the recommended format to be used to allow traffic monitoring.

(i) The ID signal injection equipment shall be operational at all times, continuously encoding the uplink transmission, and shall not be bypassed; and

(j) In the case of unscrambled transmissions, the Vertical Blanking Interval is the appropriate place for the relevant information.

Line 20, field 1, frames 02 through 29 should be used in a single line technique. Multiple line techniques are permissible provided they comply with FCC regulations for incidental radiation from terrestrial broadcasters. Multiple line and other techniques may be submitted to the Commission for recognition.

(k) All requests for Commission recognition of an ATIS system shall be submitted to The Secretary, Federal Communications Commission. A recommended or authorized ATIS system that is recognized by the Commission must be employed.

APPENDIX

For traditional two-way voice communication services, there are a multitude of ATIS methods that could be employed. As supplemental information and a talking point for the inquiry, the following ATIS method has been discussed within the Commission:

(a) The automatic transmitter identification system circuitry shall be so installed that its removal would preclude proper transmitter operation. Its code shall be protected against changing or disabling by the operator. A manufacturer preset unique eight digit code plus a user set call sign will be used.

(b) As a preferred approved method, the automatic transmitter identification system digits shall be transmitted in accordance with the following:

(1) Transmission will be by synchronous, differential phase shift keying at a rate of 1200 (+ – 0.01%) baud. Transmissions shall be compatible with demodulation in accordance with CCITT recommendation V.22.

(2) Transmission carrier shall be 1200 Hz derived from a source of suitable accuracy to achieve the above data rate specification.

(3) Each transmission shall be preceded by the transmission of the equivalent of at least 20 bits of constant "zeros" to initialize the data "scrambler."

(4) Transmissions shall be processed with a 17 bit Pseudo random data scrambler prior to transmission which adheres to the following equation.

$$D(scr) = D1 + (D14 + D17)$$

(+ denotes the exclusive or operation)

(5) Transmitted bytes shall consist of eight data bits which can be organized to represent either two hexidecimal digits (packed mode of transmission) or a single ASCII character with a zero most significant bit appended.

(6) Use of industry standard integrated circuits for performing the functions of asynchronous to synchronous conversion, pseudo random scrambling, and DPSK modulation are encouraged.

Application, Failure to Prosecute
Dismissal of Application
Site Availability

Review Board affirms dismissal of application for failure to prosecute. Appellant, which had lost counsel, failed to respond to several important prehearing and discovery pleadings including a motion to dismiss. Additionally, its application was fatally deficient because it had never had reasonable assurance of its transmitter site.

—*Classic Vision, Inc.*

MM Docket No. 85-364

FCC 86R-55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re applications of	
CLASSIC VISION, INC	File No. BPCT-850529KE
4-A COMMUNICATIONS	File No. BPCT-850725KI
INDEPENDENT CONCEPTS	File No. BPCT-850725KP
For a construction permit Las Vegas, Nevada	

MEMORANDUM OPINION AND ORDER

Adopted: August 22, 1986; Released: September 3, 1986

BY THE REVIEW BOARD:

1. Venture Broadcasting Co. has filed an appeal from the presiding Administrative Law Judge's dismissal of its application for failure to prosecute. *Memorandum Opinion and Order*, FCC 86M-2242, released July 11, 1986. Our review reveals that the ALJ's ruling was reasonable and in accord with established

precedent and practice. See cases cited in *RKO General, Inc., (KFRC)*, 102 FCC 2d 1417 (Rev. Bd. 1985).

2. Venture last participated in the prehearing proceedings which led to the addition of an issue on March 20, 1986 to determine whether Venture had made inaccurate representations regarding the assurance it gave the Commission about its proposed transmitter site. FCC 86M-2242, *supra*, at para. 2. Thereafter, Venture failed to respond to a motion to enlarge filed May 12, 1986; a motion for production of documents filed May 20; motions to compel filed May 12 and 16; and a motion to dismiss filed on June 4, 1986. The presiding judge waited an additional *three weeks* after a response to the motion to dismiss was due on June 18, before concluding: "Venture has in material respects failed to prosecute its application and the motion to dismiss will be granted." FCC 86M-2242, para. 2.

3. On appeal Venture acknowledges that it did not "timely respond to five pleadings within two months of May and June of this year, one of them being [the] *Motion to Dismiss*." Venture claims however that it had participated in the case "until the time its legal counsel withdrew on May 12, 1986." It offers the following explanation for the failures: Venture acted with due diligence to engage other counsel, but was delayed by previous counsel's failure to release the Venture files until July. During the disruption of business that ensued during this *interim* period of time, some matters 'slip through the cracks.' Venture does not seek to excuse its oversights which arose without counsel, but at the same time, it does not believe that [two previous precedents] are to be applied in 'blunderbuss' fashion . . . . No basis exists to conclude that Venture has abandoned prosecution of its application. Appeal p. 5.

4. Two competing applicants, Classic Vision, and 4-A Communications, object because "with even slight diligence, [new] competent communications counsel could easily have been obtained in a few days . . . ." Instead, more than two months passed and Venture failed to respond to numerous prehearing and discovery pleadings designed to help develop the written case and exhibits for the trial-type hearing now scheduled for August 25, 1986. They argue that to now allow Venture back into the case would disrupt the hearing schedule and adversely affect those other applicants who have complied with all the requirements and are now ready for trial.

5. Prehearing and discovery procedures are designed to help simplify the issues and expedite matters ultimately to be tried. *See Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 170 (Rev. Bd. 1982); *Faith Center, Inc.*, 92 FCC 2d 1255, 1260 (Rev. Bd.), *rev. denied*, FCC 85-530 (FCC 1983), *affirmed by judgment* No. 83-2295 (D.C. Cir. May 9, 1985). A presiding ALJ is therefore well within his discretion and is justified in dismissing an application which, without adequate and good cause, disrupts this crucial part of the hearing process. *See Pan American, supra*, and *Faith Center, supra*. Here the ALJ did not rush to dismiss even though Venture had failed to respond to several important prehearing and discovery pleadings including the crucial motion to dismiss. After waiting an additional three weeks, he finally dismissed Venture for failing to prosecute. We agree that the ALJ struck the correct balance in this multi-party comparative case. *See RKO General, supra*, and cases cited therein.

6. Venture's appeal fails to identify any special circumstances which might require reinstatement of its application. *See Horizon Community Broadcasters, Ltd.*, 102 FCC 2d 1267, 1270 (Rev. Bd. 1985), and *Haughton Partnership, Ltd.*, FCC 86R-52, released August 15, 1986. On the contrary the pleadings before us confirm the soundness of the ALJ's ruling. And, we need not finally resolve who was primarily responsible for Venture's critical faults — former counsel, present counsel, or the applicant itself — because an applicant cannot escape the consequences of its failure to prosecute by shifting responsibility to counsel. *Vela Broadcasting Co.*, 102 FCC 2d 977, 999-1000 (Rev. Bd. 1985). Here the undisputed facts do establish that the defects were attributable to a more than two month hiatus during which the applicant apparently attempted to secure new counsel. The applicant was partially responsible for the delay and was certainly aware of that state of affairs. Moreover, even if special circumstances had been shown, no useful purpose would be served by permitting Venture to re-enter this case. It appears that almost six months ago Venture conceded that it had "no understanding with the owner of the [transmitter] site it specified in its application". That fatal admission by Venture establishes that it is not a basically qualified applicant, and hence could not ultimately prevail in this proceeding, since the law is clear that "an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with . . ." *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845, n. 12 (Rev. Bd. 1984). Classic Visions Opposition to Appeal p. 4. Accordingly, IT

IS ORDERED that the Appeal filed on July 23, 1986 by Venture Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Common Carrier, Service, Need for Rulemaking, Notice of Proposed

Notice of Proposed Rulemaking adopted to develop policies and guidelines concerning applications for facilities to provide common carrier telecommunications services between the island of Puerto Rico and off-island points. Commission examines applications and other pleadings that have been submitted, request further information from the parties, raise options in disposing of particular applications and reach certain tentative conclusions.

—*Common Carrier Facilities*
CC Docket No. 86-309

FCC 86-319

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off of the Island of Puerto Rico.	CC Docket No. 86-309

NOTICE OF PROPOSED RULEMAKING

Adopted: July 9, 1986; Released: July 18, 1986

BY THE COMMISSION: COMMISSIONER DENNIS NOT PARTICIPATING.

I. Introduction

1. We hereby give notice of a proposed rulemaking to develop policies and guidelines concerning applications for facilities to provide common carrier telecommunications services between the island of Puerto Rico and off-island points. This rulemaking proceeding is instituted in light of the filing of seven such applications currently pending with the Commission.[1] The Puerto

[1] The Commission is now engaged in a separate proceeding to develop policies

Rico Telephone Company (PRTC) has filed an application, pursuant to Section 214 of the Communications Act of 1934, 47 U.S.C. § 214 (1976), requesting authority to acquire and operate circuits on existing facilities for the provision of direct telecommunications service between Puerto Rico, on the one hand, and the U.S. mainland and U.S. Virgin Islands, on the other. PRTC and two affiliates of ITT World Communications, Inc — All America Cables and Radio (AACR) and ITT Communications, Inc-Virgin Islands (ITTCIVI) (collectively referred to as "the ITT Companies") — have filed Section 214 applications requesting authority to acquire and operate circuits on existing facilities for the provision of direct service between Puerto Rico and Canada. Further, both PRTC and AACR have filed applications, pursuant to Section 214 and Sections 308-310, 319 of the Communications Act, respectively, requesting authority to construct, operate and establish channels through international communications satellite earth stations in Puerto Rico to operate with the INTELSAT system.

2. Our initial examination of the pending off-island applications reveals that both applicants, PRTC and the ITT Companies/AACR, appear to possess the requisite minimum legal, financial and technical qualifications to construct and operate an international Standard A satellite earth station in Puerto Rico and to establish channels of communications through this earth station or through existing facilities to provide direct off-island telecommunications services. In this Notice of Proposed Rulemaking (NPRM), we examine the applications and other pleadings that have been submitted, request further information from the parties, raise options in disposing of particular applications and reach certain tentative conclusions.

3. Specifically, we tentatively conclude that the authorization of direct rather than indirect off-island service would improve the efficiency and reliability of offerings to the public and that the ITT Companies should be authorized to provide direct off-island service via existing facilities. We also tentatively conclude that the public would benefit from the operation of at least one international Standard A earth station on the island. We further tentatively conclude that competition in the provision of off-island

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and guidelines for the construction and use of common carrier transmission facilities in the Caribbean region during the period 1985-1995. Caribbean Facilities Planning, Notice of Proposed Rulemaking, CC Docket No. 83-525, FCC 86-29, Mimeo No. 36365 (released February 5, 1986). The issues in CC Docket No. 83-525 are separate from those under consideration in this proceeding.

international service is feasible for various markets and would benefit the public if instituted fairly. Moreover, we tentatively conclude that PRTC should not be authorized to provide off-island service until it has demonstrated that all authorized off-island carriers are ensured equal access to users or, in the alternative, AACR, as the traditional off-island carrier, is provided premium access. We further note that other carriers must be allowed to interconnect their off-island switches to PRTC's off-island toll switch. We additionally tentatively conclude that the opportunity for PRTC to cross-subsidize its off-island activities can most appropriately be minimized by requiring the use of cost allocation mechanisms rather than structural separation between PRTC's intra-island and off-island operations. Finally, we propose that PRTC be required to disclose publicly certain forms of network information.

4. Below, we briefly describe the applicants and the existing facilities for providing off-island service. We next summarize the seven pending applications to provide off-island service and the pleadings filed in response to these applications to the extent they are relevant to this rulemaking proceeding. We also summarize the proceedings which resulted from our processing of three such applications, and we dismiss one of these applications. We then analyze this information, reach certain tentative conclusions, identify feasible options and formulate requests for further useful information

II. Background

A. The Applicants and the Existing Off-Island Facilities

5. PRTC is a government-owned, local exchange carrier which provides approximately ninety percent of Puerto Rico's intra-island telephone service.[2] The island network and PRTC's off-island toll switching facilities interconnect with the facilities of AACR for the orgination and termination of off-island traffic.[3]

[2] The remaining 10 percent of intra-island telephone service is provided by the Puerto Rico Communications Authority (PRCA) which, like PRTC, is owned by the Commonwealth of Puerto Rico. The Commonwealth purchased PRTC in 1974 from AACR.

[3] PRTC also provides private line service between Puerto Rico and the U.S. mainland under PRTC Tariff FCC No. 3, in conjunction with the American Satellite Company, through a general purpose earth station and several dedicated earth stations. PRTC's affiliate, PRCA, has been authorized by the Commission to provide telex service between Puerto Rico and the U.S. mainland and mailgram service outbound from Puerto Rico to the U.S. mainland. Puerto Rico Communications Authority, 92 FCC 2d 1432 (1983).

For most off-island traffic streams, including Puerto Rico-Canada, the facilities of AACR, the intermediary carrier, provide the circuits between Puerto Rico and the U.S. mainland where they interconnect with the switching facilities of the American Telephone and Telegraph Company (AT&T). AACR's affiliates, ITTCIVI and the Virgin Islands Telephone Company, serve as the intermediary and local exchange carriers, respectively, for the U.S. Virgin Islands.

6. Currently, all off-island telecommunications traffic is exchanged through approximately 1800 feet of voice frequency cable located in a San Juan conduit which functions as the point of interconnection between PRTC and AACR. Puerto Rico's only off-island toll switch is owned and operated entirely by PRTC. AACR provides off-island service to the U.S. mainland through several facilities: the Cayey, Puerto Rico earth station which operates with the Telstar domestic satellite system, the Florico cable, and the Florida-St. Thomas cables. AACR owns and operates the Cayey earth station and the major microwave system between the station and the point of interconnection with PRTC. AACR also controls the Florico cablehead on Puerto Rico. It further shares in ownership and operation of the microwave facilities between Puerto Rico and the St. Thomas cableheads with ITTCIVI.

B. Section 214 Applications to Provide Direct Service Via Existing Facilities

7. On December 21, 1978, PRTC filed with the Commission a Section 214 application (File Nos. I-P-D-8 and I-P-C-48) (Mainland application) proposing to provide directly message telephone service (MTS) and Wide Area Telephone Service (WATS) between Puerto Rico and points in or reached via the U.S. mainland and between Puerto Rico and the U.S. Virgin Islands.[4] PRTC claimed that the grant of its application would, by eliminating the intermediary, result in the provision of more efficient off-island service to end users. AACR petitioned to deny the application, arguing that it was, in essence, an attempt to decertify AACR as the carrier legally authorized to provide off-island service.

[4] PRTC requested to obtain IRU interests in over 1300 circuits in ITT-owned facilities in order to gain direct access to the U.S. mainland U.S. Virgin Islands.

8. While its Mainland application was still pending, PRTC, on May 21, 1981, filed with the Commission a Section 214 application (File No. I-P-C-81-039) to acquire twelve circuits in order to provide MTS directly between Puerto Rico and Canada (PRTC's Canada application).[5] At the time, service between Puerto Rico and Canada was provided indirectly by AACR over the facilities of several carriers. AACR petitioned to deny the application, raising various technical, legal and economic questions concerning PRTC's proposal.

9. On February 8, 1983, we released: (1) a Memorandum Opinion and Order granting in part and denying in part the Mainland application (Mainland order)[6] and (2) a Memorandum Opinion and Order granting in part and denying in part PRTC's Canada application (*Canada* order)[7]. In the *Mainland* order, we granted PRTC's request to be certified as an off-island carrier on the basis that public benefits would result from competitionwith AACR. However, we refused to grant PRTC's request that we compel the conveyance to PRTC of IRUs in over 1300 circuits in ITT-owned facilities. We found that granting this request would amount to decertifying AACR as the off-island carrier for Puerto Rico and authorizing PRTC to merely take AACR's place as the off-island monopolist. In the *Canada* order, we authorized PRTC to establish twelve voice grade circuits in order to provide MTS between Puerto Rico and Canada. We cited lower rates and better service to residents of Puerto Rico among the foreseeable benefits to MTS users of PRTC's entry into the market. Further, we denied PRTC's proposed arrangement for controlling overflow traffic routing.

10. On June 15, 1984, the Court of Appeals for the District of Columbia Circuit vacated and remanded both the *Mainland* order and the *Canada* order.[8] The court determined that the basic issue in reviewing both orders was our certification of PRTC to *compete* with AACR, in light of the fact that PRTC's applications were in essence requests to *replace* AACR as the off-island monopolist. The court stated that the issues to be resolved in a competition proceeding differ considerably from those which must

[5] We point out that international MTS is the major international telecommunications service in terms of revenues (over 70%) and circuit requirements (over 80%). International Competitive Carrier Policies, Report and Order, CC Docket No. 85-107, FCC No. 85-585, at 14 (released November 15, 1985).

[6] Puerto Rico Telephone Company, 92 FCC 2d 1444 (1983).

[7] Puerto Rico Telephone Company, 92 FCC 2d 1461 (1983).

[8] AACR v. FCC, 736 F. 2d 752 (1984). On August 14, 1984, the court denied the Commission's petition for rehearing.

be decided in a proceeding to replace one monopoly carrier with another. The court concluded that AACR was not provided an adequate opportunity to respond to the issues involving competition.

11. The court also found that the conclusions drawn in the orders were not adequately substantiated. In particular, the court determined that the Commission had not amassed a sufficient record on which to evaluate whether competition between PRTC and AACR in the relevant markets would promote the public interest or whether PRTC's entry would actually enhance competition in these markets.[9] In addition, the court found that the Commission treated PRTC's Canada application as a mere adjunct to its Mainland application, and pointed out that the former application may present issues unique to the international context, such as those involving ownership and interconnection policies.

12. Subsequent to the court's decision, the ITT Companies filed with the Commission on August 23, 1984, a Section 214 application (File No. I-T-C-84-186) requesting authority to acquire eighteen voice grade circuits on existing facilities for use in providing direct service between Puerto Rico and Canada.[10] PRTC filed a petition to deny, condition and/or consolidate with its own amended Canada application the ITT Companies' Canada application. PRTC argues that grant of the application would further entrench the ITT Companies' off-island monopoly, which has allegedly resulted in artificially high rates and inefficient service for international MTS calls. PRTC also contends that any grant of the application should be made conditional on the ITT Companies' selling to PRTC IRU interests in their Puerto

[9] The court's decision implicitly called upon PRTC, in order to obtain authorization to provide off-island MTS and WATS, to update its applications to propose competition with AACR, resolve the court's concerns with PRTC's entry into off-island markets and propose an alternative plan for access for multiple off-island carriers to the island network. Though it has subsequently amended its Canada application, PRTC has not amended its Mainland application or filed additional pleadings in that proceeding. We find the record in the proceeding is now stale, and we dismiss PRTC's Mainland application, pursuant to Section 1.748 of the Commission's Rules and Regulations (the Rules), 47 C.F.R. §1.748 (1985). We dismiss with prejudice that portion of the application which we denied in the *Mainland* order, *i.e.*, PRTC's request that we compel the conveyance of IRU interests in over 1300 circuits in ITT-owned off-island facilities. This does not preclude PRTC from applying to compete with AACR to provide service between Puerto Rico, on the one hand, and the U.S. mainland and the U.S. Virgin Islands, on the other.

[10] The ITT Companies note that telecommunications services between Puerto Rico and Canada are currently provided by AACR on a switched basis via the U.S. mainland.

Rico-U.S. Virgin Islands microwave facility. PRTC charges that the ITT Companies' willingness to sell IRUs in the same facility to non-competitors but not to PRTC, a prospective competitor, constitutes unreasonable discrimination in violation of Sections 201(a) and 202(a) of the Communications Act (the Act).

13. On October 5, 1984, PRTC filed an amendment (File No. I-P-C-81-039-A) to its remanded Section 214 application proposing to provide MTS between Puerto Rico and Canada. PRTC's amended application requests authority to establish up to sixteen voice grade circuits on existing facilities for use in providing direct Puerto Rico-Canada service.[11] PRTC estimates that authorization for sixteen circuits is necessary for it to serve its projected share (*i.e.* approximately fifty percent) of the anticipated Puerto Rico-Canada traffic requirements through 1988. PRTC argues that its entrance into the Puerto Rico-Canada market would contribute to the benefits of competition in the provision of international switched services, resulting in lower rates and better service to the public.

14. AACR filed a petition to deny PRTC's amended Canada application.[12] AACR argues that grant of the application cannot be justified on the basis of promoting competition, since PRTC's control over the island network and off-island toll switch would allow it to route all off-island traffic to its own facilities, eliminating any possibility of customer choice.[13] AACR also contends that, as a publicly owned entity subsidized by the Commonwealth of Puerto Rico, PRTC should not be allowed to offer long distance communications services. AACR further maintains that as a local exchange carrier, PRTC could subsidize its competitive off-island activities by shifting costs associated with these activities to its monopoly intra-island activities. AACR additionally argues that PRTC's proposal to purchase IRU interests in the St. Thomas III cable from Teleglobe Canada at

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[11] PRTC notes that, after the release of the *Canada* order, it provided service with Teleglobe Canada using facilities leased from the ITT Companies and AT&T. This service was terminated on August 22, 1984, pursuant to the court's decision.

[12] AACR had previously filed a petition to reject PRTC's amended application. After PRTC filed an opposition to AACR's petition to reject, and AACR filed a reply to PRTC's opposition, AACR's petition to reject was denied in an order issued under delegated authority by the Common Carrier Bureau. Puerto Rico Telephone Company, Mimeo No. 2072 (released January 23, 1985).

[13] AACR comments that after PRTC's original Canada application was granted, PRTC immediately procured 100 percent of the Puerto Rico-Canada MTS market. Currently, suggests AACR, there exist at least 15 actual or potential competitors in the off-island MTS market, including three voice resale carriers which provide or have been authorized to provide off-island services.

original cost plus interest violates the Commission's policy requiring such purchases to be at net book cost. Finally, AACR argues that PRTC's request that the Commission compel a conveyance in the ITT Companies', Puerto Rico-U.S. Virgin Islands microwave system should be rejected.

C. Applications to Construct, Operate and Establish Channels Through International Earth Stations

15. In July 1967, we authorized the construction of a satellite earth station in Cayey, Puerto Rico for service in conjunction with INTELSAT satellites, to be operated under the Earth Station Ownership Committee (ESOC) arrangement.[14] The station commenced operation in 1969 and was used as an international earth station under the ESOC arrangement through part of 1979. In that year, following evidentiary proceedings in Docket No. 20598, we approved transfer of full ownership of the station from Comsat/ESOC to AACR, and, in order to improve service between Puerto Rico and the U.S. mainland, we approved conversion of the station from one which accesses the INTELSAT system to one which operates in conjunction with the U.S. domestic satellite system.[15]

16. On September 30, 1982, AACR filed with the Commission: (1) an application (File No. CSG-82-003-P), pursuant to Sections 308-310 and 319 of the Act, requesting authority to augment its existing domestic earth station facilities by constructing and operating a Standard A international communications satellite earth station at Cayey, Puerto Rico; and (2) an application (File No. I-P-C-82-049), pursuant to Section 214 of the Act, requesting authority to establish channels of communication capable of deriving 228 voice grade circuits at the proposed Cayey international earth station facility. Through the proposed earth station, AACR proposes to establish direct communications services between Puerto Rico/U.S. Virgin Islands and eighteen foreign countries in several continents. AACR proposes to provide services via Guatemala to four additional countries. AACR estimates that capital investment for the station would be approximately $5.2 million and total expenses including depreciation, operation and maintenance costs, taxes and circuit rental

[14] Communications Satellite Corporation (Comsat), *et al.*, 8 FCC 2d 1001 (1967). *See also*, Ownership and Operation of Earth Stations, 5 FCC 2d 812, 819 (1966).

[15] All America Cables and Radio, Inc., 74 FCC 2d 149 (1979).

costs) would be approximately $3.0 million annually for the years 1987-1990.

17. PRTC and Comsat filed petitions to deny AACR's applications. In its petition, Comsat claims that AACR has delayed the benefits to Puerto Rico of direct international satellite communications services via INTELSAT until it now is in AACR's economic interests to make them available. Comsat also argues that earth stations of the type proposed by AACR should be owned by a consortium of carriers rather than singularly by AACR. In its petition, PRTC claims that AACR's proposed station would impose unnecessarily high costs on ratepayers. PRTC also states that the grant of AACR's applications would harm the public by further entrenching AACR's monopoly over off-island facilities. PRTC additionally argues that AACR's proposal fails to provide an adequate role in the planning, operation and ownership of the station to PRTC, which would originate, terminate and switch the vast majority of traffic through any Puerto Rico international earth station.

18. On May 16, 1985, PRTC filed: 1) an application (File No. CSG-85-048-P), pursuant to Section 308-310 and 319 (*i.e.* Title III) of the Act, requesting authority to construct and operate a Standard A international earth station in Humacao, Puerto Rico; and 2) an application (File No. I-T-C-85-157), pursuant to Section 214 of the Act, requesting authority to establish 224 voice grade circuits at the Humacao facility. Through the proposed station, PRTC anticipates providing direct services to nineteen countries in several continents. PRTC's proposal includes the provision of service to Canada, with which it already has an operating agreement. PRTC estimates that capital investment for the station would be approximately $6.4 million and total expenses (including depreciation, operation and maintenance costs, payments in lieu of taxes and circuit rental costs) would be approximately $2.9 million annually for the years 1987-1990.

19. AACR filed a petition to deny PRTC's applications. In its petition, AACR argues that PRTC proposes and possesses the ability to monopolize, initially, service to sixteen countries presently served directly or indirectly by AACR. This monopolization, claims AACR, would result from PRTC's seeking authority to acquire and activate enough circuits to carry 132 percent of the projected 1987 circuit requirements for these countries, and PRTC's complete power, as the intra-island monopolist and owner of the off-island switch, to route any international call to its own overseas facilities. AACR contends that PRTC's earth station

applications should not be granted until it has successfully resolved the many concerns raised with respect to its Canada application which fully apply to these applications as well (*e.g.*, inadequate access for multiple off-island carriers to the island network, PRTC's receipt of government subsidies and PRTC's ability to cross-subsidize its off-island business with revenues derived from its intra-island activities).

III. Discussion

20. Our preliminary examination of the pending off-island applications reveals that both current applicants — the ITT Companies/AACR and PRTC — appear to possess the minimum legal, technical and financial qualifications to construct and operate an international Standard A earth station on the island and to establish channels of communications through this earth station or through existing facilities to provide off-island telecommunications service. We tentatively conclude from analyzing the record that the public would benefit from the introduction of direct service between Puerto Rico and additional off-island points. We also tentatively conclude that competition is feasible in various off-island international markets and that, where feasible, competition would benefit the public. Further, we propose that the ITT Companies be authorized to establish direct service on existing facilities to additional off-island points. Moreover, we tentatively conclude that conditions have not yet been established to ensure that PRTC would compete in off-island markets without unfair advantages and in full compliance with Commission policy. While we therefore tentatively conclude that granting any of PRTC's off-island Section 214 applications in their current form would not promote the public interest, we propose guidelines for the creation of fair competitive conditions of entry for multiple off-island carriers, including PRTC.[16]

21. While we tentatively conclude that the institution of Standard A international satellite earth station service on the island would promote the public interest, we make no tentative findings regarding the proper disposition of the two sets of international earth station applications that have been filed. Instead, we discuss the public record on these applications and

[16] If PRTC is ultimately licensed to enter off-island markets subject to requirements based on the guidelines we now propose, we would monitor its performance and the development of these markets. Should such requirements prove insufficient to guard against anti-competitive conduct or prove overly burdensome and unnecessary, we will act to adjust the requirements.

discuss options available to us in disposing of the applications. We specifically address the possibility that the market will not support operations by both of the proposed earth stations and request additional data in order to determine whether this is the case. We also address the Commission's options in the event we conclude both stations should not be authorized.

A. Qualifications of the Current Applicants

22. Our preliminary review of the current applications to provide off-island telecommunications services to and from Puerto Rico reveals that the two applicants — the ITT Companies/AACR and PRTC — appear to possess the requisite minimum legal, technical and financial qualifications to construct and operate international Standard A satellite earth stations and to receive Section 214 authority to establish direct circuits between Puerto Rico and overseas points.

23. The ITT Companies' legal, financial and technical qualifications to provide direct overseas telecommunications services are well established. AACR and ITTCIVI are authoritzed as common carriers, to own, operate and control telecommunications facilities through which they provide overseas service to and from Puerto Rico and the U.S. Virgin Islands, respectively. They have already demonstrated technical expertise in providing off-island services via satellite, microwave transmission facilities and analog cables. The record further indicates that both carriers are in sound financial condition. AACR possesses total assets of nearly $30 million and earns an annual after-tax operating income in excess of $4 million;[17] ITTCIVI possesses total assets of nearly $17 million and earns an annual after-tax operating income in excess of $2 million.[18] In addition, the ITT Companies have filed the requisite Common Carrier and Satellite Radio License Qualification Report (FCC Form 430) which establishes their legal qualifications to construct and operate an earth station under Title III of the Act.

24. PRTC also appears to possess the required minimum legal, technical and financial qualifications to receive Section 214 and Title III authorization to provide direct off-island telecommunications service. As we found in the *Mainland* order, remanded on other grounds, PRTC demonstrated that it had upgraded its facilities and services and appeared to be in a sound financial

[17] AACR Annual Report Form M, Year Ended December 31, 1984.
[18] ITTCIVI Annual Report Form M, Year Ended December 31, 1984.

position as of year end 1981.[19] Recent data demonstrate that the technical and financial improvements in PRTC's operations are continuing. From 1982 to 1984, PRTC increased its number of access lines in service from 473,792 to 547,462, reflecting an annual growth rate of 7.5 percent, and increased its telephone plant investment from approximately $1.0 billion to $1.2 billion, reflecting an annual growth rate of 6.1 percent.[20] PRTC and its parent, the Puerto Rico Telephone Authority, have financed most of this construction from internally generated funds.[21] Consolidated retained earnings have increased from $36 million on December 31, 1981 to $132 million on December 31, 1984.[22] Further, PRTC's operating revenues have increased from $296 million in 1982 to $360 in 1984. Revenue growth has averaged over thirteen percent in the 1980s.[23] In addition, PRTC, in its Common Carrier and Satellite Radio Licensee Qualification Report (FCC Form 430), has established that it is legally qualified to construct and operate a Title III earth station.[24]

B. Section 214 Applications

1. Proposed Public Benefits

25. Each pending off-island Section 214 application proposes the initiation of direct telecommunications service between Puerto Rico and one or more off-island points.[25] We tentatively conclude that the public convenience and necessity would be substantially furthered by the introduction of direct telecommunications service between Puerto Rico and additional off-island points. We have consistently held that authorization for direct rather than indirect service (*i.e.*, service wholly provided on dedicated facilities between two points) should improve the efficiency and reliability of

[19] The Mainland order, 92 FCC 2d at 1452-3.

[20] Puerto Rico Telephone Authority and Subsidiary PRTC 1984 Annual Report, at 4, 9.

[21] *Id.* at 44.

[22] *Id.* at 53.

[23] *Id.*

[24] Since the construction of PRTC's proposed earth station would constitute a "major matter," according to Section 1.1305(a)(5) of the Rules, we would carefully review PRTC's Title III application to ensure conformance with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4347. As the antenna structure in AACR's proposed earth station would be constructed in an established antenna farm, construction of the station would not be considered a "major matter" under the Rules. 47 C.F.R. § 1.1305(b)(1).

[25] Obviously, either Section 214 application to establish channels of communication through the applicant's proposed earth station would not be granted if the applicant's underlying Title III earth station application is not also granted. We discuss the merits of the Title III applications, *infra*, in paras. 59-68.

carrier's service offerings.[26] We have also noted that competition between carriers providing direct circuits generally results in inducing carriers to introduce new services and to upgrade their plant facilities and service quality, while at the same time reducing rates charged to the public.[27] For much off-island traffic, for example, the implementation of direct service would eliminate the need for accessing AT&T's switching facilities on the U.S. mainland. This would benefit the public by reducing the off-island carrier's overall costs in providing service and by decreasing the potential for outages and congestion.

26. In each of its Section 214 applications, PRTC argues that its entry into additional markets would further the public convenience and necessity by developing competition in these markets. In MTS and WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, CC Docket No. 78-72, 81 FCC 2d 177 (1980), we declared MTS/WATS competition in the provision of interstate inter-exchange services to be in the public interest.[28] We further stated that any entity opposing entry by a new carrier has the burden to show by clear and convincing evidence that competition would not benefit the public. Puerto Rico is included within the scope of the MTS and WATS Market Structure proceeding.[29] As we have not received evidence challenging the benefits of competition in the domestic off-island market, we rely on our findings in the MTS and WATS Market Structure proceeding to conclude that competition in the domestic off-island market would benefit the public.

27. To evaluate a Section 214 application proposing competition in one or more international off-island markets, we have analyzed whether competition is reasonably feasible and whether additional

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[26] TRT Telecommunications Corporation, Memorandum Opinion, Order, Authorization and Certificate, File No. I-T-C-2462-9, FCC 75T-18, at 7-8 (released September 23, 1975); TRT Telecommunications Corporation, 46 FCC 2d 1042, 1053, (1974). *See also*, Tropical Radio Telegraph Company, 35 FCC 2d 950, 958-9 (1972), *reconsideration denied*, 40 FCC 2d 1168 (1973); and Mackay Radio and Telegraph Co. (Mackay Radio), 28 FCC 231, 243 (1960).

[27] Tropical Radio Telegraph Company, *id*, at 958-9; Mackay Radio *id*, at 243.

[28] The Act defines "interstate communication" to include communications between Puerto Rico and any other domestic point aside from the Canal Zone. 47 U.S.C. 153(e).

[29] While we stated in the *Mainland* order at 1454, n. 23, that the Commonwealth of Puerto Rico was not explicitly said to be included within the scope of the MTS and WATS Market Structure proceeding, that proceeding was never limited to the U.S. mainland. We believe it is clear from the text of our decisions in the proceeding that the proceeding applies to Puerto Rico and all other U.S. points. *See* MTS and WATS Market Structure, CC Docket No. 78-72, 75 FCC 2d 644 (1980).

competition would benefit the public.[30] As we have previously stated, "feasibility of competition depends on whether there is sufficient traffic to support the addition of another competing direct circuit and upon the effect of the opening of such circuit upon the applicant as well as all other carriers providing service to the public."[31] To determine whether additional competition benefits the public, "the Commission is not required to make specific findings of tangible benefits . . . but the Commission must at least warrant . . . that competition would serve some beneficial purpose, such as maintaining good service and improving it."[32]

28. We tentatively conclude that the development of competition is feasible for various off-island international markets. Consider, for example, the market for Puerto Rico-Canada MTS, which we have examined in depth subsequent to the court's remand of our *Canada* order. Currently, AACR is the only facilities-based carrier authorized to provide international service to and from Puerto Rico. We have also authorized several resellers to provide switched voice services between Puerto Rico and foreign points.[33] Traffic reports and projections of the parties suggest that growth in the Puerto Rico-Canada MTS market is steady and substantial. According to the ITT Companies, traffic reports indicate that telephone traffic between Puerto Rico and Canada has increased from 723,880 minutes in 1981 to 822,970 minutes in 1983, reflecting an annual growth rate in excess of six percent.[34] The ITT Companies project that Puerto Rico-Canada telephone traffic will increase at a rate of six percent for the foreseeable future.[35] PRTC projects that MTS traffic between Puerto Rico and Canada will increase, at an annual rate of ten percent, to 1,280,000 minutes annually by 1988.[36] PRTC notes in support of this projection that the current and expected rate of annual growth for all U.S.-Canada voice traffic has been estimated

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[30] *See* FCC v. RCA Communications, Inc. (FCC v. RCA), 346 U.S. 86 (1953).

[31] Mackay Radio, 28 FCC at 239.

[32] FCC v. RCA, 346 U.S. at 96-7.

[33] Caribbean Automated Long Lines Services, Order, Authorization, and Certificate, File No. I-T-C-85-212 (released October 28, 1985); Telecom Plus International, Memorandum Opinion and Order, File No. I-P-C-83-029 (released August 3, 1984); TDX Systems Inc., Order Authorization and Certificate, File No. I-T-C-85-077 (released April 3, 1985).

[34] Application of the ITT Companies, File No. I-T-C-84-186, at 8 (received August 23, 1984).

[35] *Id.* at 8-9; Amendment to Application of AACR, File Nos. CSG-82-033-P, I-P-C-82-049, Attachment A-2 (received April 29, 1985).

[36] Amendment to Application of PRTC, File No. I-P-C-81-039-A, Exhibit 4 (received October 5, 1984).

at ten percent.[37] We note that the ITT Companies have not argued that the market could not sustain competition from PRTC, if the latter is provided no unfair competitive advantages.

29. In their Title III earth station applications, PRTC and AACR have supplied data projecting market demand during the years 1987-91 and 1987-90, respectively, for several significant international telecommunications markets involving Puerto Rico.[38] These data indicate that competition is feasible on the island for a number of growing international telecommunications markets, several of which are expected to exceed the Puerto Rico-Canada market in terms of the level of demand.

30. We also tentatively find that, where feasible, competition in off-island international markets would benefit the public. The Commission has concluded in various contexts that increased competition, if found to be reasonably feasible, would result in: the provision of telecommunications service at the lowest possible cost; the reduction of waste; increased responsiveness by carriers to the needs and desires of consumers; and quicker and more efficient responsiveness by carriers to technical change and innovation.[39] The advantages of a mere threat of competition in the Puerto-Rico-Canada market were apparently demonstrated when PRTC proposed rates for service to Canada of as much as thirty percent less than the rates offered by AACR, and the latter shortly thereafter filed its own reductions matching PRTC's proposed rates.[40] We note further that the ITT Companies' application to provide direct Puerto Rico-Canada service may possibly have been provoked, in part, by PRTC's application to provide direct circuits between the two points. With respect to whether additional entry will burden the ratepayer with excessive investments in facilities, we believe that a competitor operating in a market with alternative suppliers will acquire only as much capacity as is warranted by demand. Of course, in evaluating the

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[37] MCI Telecommunications Corporation, *et al.*, Order Authorization and Certificate, File No. I-P-C-83-052, at para. 8 (released April 16, 1985).

[38] Application of PRTC, File No. CSG-85-048-P, Tables 1-2 (received May 16, 1985); Amendment to Application of AACR, File Nos. CSG-82-033-P, I-P-C-82-049, Attachment A-2 (received April 29, 1985).

[39] *See* MTS and WATS Market Structure, 81 FCC 2d 177, 202 (1980); International Relay, Inc., 77 FCC 2d 819, 824 (1980) *on reconsideration*, 82 FCC 2d 41 (1981); MCI Telecommunications Corporation, *supra*, n. 37 at para. 8; Satellite Business Systems, 91 FCC 2d 941, 946-7 (1982); Western Union Telegraph Co., 91 FCC 2d 1051, 1061-3 (1982).

[40] *See* All America Cables and Radio, Inc., Tariff F.C.C. No. 1, Transmittal No. 88 (filed September 21, 1981) (tariff matches PRTC's proposed rates). *See also* the Canada order, 92 FCC 2d at 1468-9.

introduction of competition in a specific context, we would consider any opportunity for an entrant to utilize unfair competitive advantages to gain control of the market and deter additional entry.

2. Issues Raised Concerning the ITT Companies'/AACR's Applications

31. PRTC opposes the ITT Companies' Canada application and AACR's Section 214 application to establish direct circuits through its proposed international earth station essentially on the ground that the applications would harm the public by further entrenching the position of the off-island monopolist. We are not persuaded by this argument, for which PRTC offers little support. We do not foresee how the grant of applications by a traditional off-island carrier to implement direct service to additional points would prejudice opportunities for other qualified carriers to compete in these same markets.

32. An additional contention raised by PRTC in opposition to the ITT Companies' Canada application, and also potentially relevant to future applications by the ITT Companies to provide direct service via existing facilities, involves the latter's refusal to convey to PRTC half-interests on an IRU basis in sixteen circuits in their Puerto Rico-U.S. Virgin Islands microwave facility.[41] PRTC charges that, as the ITT Companies have previously conveyed IRUs in the same facility to non-competitors and have not discussed why it would be unduly burdensome to convey the requested IRUs to PRTC, they have unlawfully discriminated against PRTC pursuant to Section 202(a) of the Act. As a result, PRTC urges the Commission either to deny the ITT Companies' Canada application or to authorize them conditional on their making available the requested IRUs. In its amended Canada application, PRTC further requests the Commission to require the ITT Companies to convey the requested IRUs to PRTC. PRTC justifies this further request on the grounds that: (a) for it to lease capacity in this facility would cost almost $3,900 per circuit year, whereas to purchase IRU interests would cost under $1,000 per circuit year; (b) the aim of its request is to obtain sufficient capacity to accomodate approximately one half of market demand and effectively open up the market to competition; and (c) the ITT Companies have previously conveyed IRU interests in the same

[41] PRTC contends, and AACR does not dispute that access to this facility is essential for a carrier, without building additional facilities, to provide direct service between Puerto Rico and Canada.

facility to various carriers and foreign correspondents and have not argued that it would be unduly burdensome to comply with PRTC's request.

33. AACR responds by suggesting that PRTC lease circuits in the facility and by arguing that the Commission has viewed IRU conveyances as voluntary transactions and has never compelled such a conveyance as PRTC is requesting. AACR also distinguishes its former IRU sales in the facility from PRTC's requested sale by categorizing them as: (a) conveyances involving a minimal number of circuits; (b) conveyances made in consideration for previous investments in jointy-owned facilities; or (c) transactions with foreign correpondents who function as the ITT Companies' partners in the provision of international communications service.

34. We have characterized IRU conveyances as primarily voluntary transactions between a carrier owning communications capacity and another carrier seeking to own enough capacity economically to accommodate its customers' needs.[42] Though we have never compelled a carrier-owner to sell IRU interests in its facilities, we have conditioned authorizations to construct and operate facilities on the applicant's making IRU interests available to future entrants.[43]

35. We tentatively agree with PRTC that the merits of its IRU request were not resolved by the public-interest finding in the *Mainland* order in which we refused to grant a PRTC request that we compel the sale of IRU interests in over 1300 circuits in various ITT-owned facilities.[44] We tentatively find that the previous request was different from the current IRU request in two essential respects. First, the scope of each request was entirely different: the current request seeks only half interests in sixteen circuits in a single facility, whereas the former request sought full-interests in over 1300 circuits in several facilities. Second, the former request sought to achieve the *de facto* decertification of AACR as Puerto Rico's off-island MTS carrier, whereas the current request ostensibly seeks to establish competition with AACR in the off-island MTS market.

36. We tentatively conclude that the ITT Companies' refusal voluntarily to convey to PRTC IRUs in their microwave facility is

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[42] *See* the Mainland order, 92 FCC 2d at 1455; *see also* AT&T Co. (TAT-8 order), 98 FCC 2d 440, 456 (1984).

[43] *See e.g.*, TAT-8 order, *id.* at 456, 471; *see also* Comsat *et al.*, 23 FCC 2d 850, 856-8 (1970).

[44] The Mainland order, 92 FCC 2d at 1446, 1455.

not grounds for delaying grant of their Section 214 Canada application. PRTC has not provided specific evidence demonstrating how such a refusal calls into question the ITT Companies' ability to provide direct off-island service in accordance with the public interest. We propose that PRTC's request that we compel the ITT Companies to make the conveyance should not be evaluated until such time as we are prepared to authorize the former's Canada application. We believe that any prior evaluation would be premature, since the reasons for or against granting PRTC's request may change considerably over time.[45]

37. We tentatively conclude that the ITT Companies' Section 214 Canada application should be granted. It is in view of the complexity of the issues presented by the application, the arguments raised by PRTC in its petition to deny the application and the interrelation of the different Section 214 applications considered in this NPRM, that we shall defer granting the application until interested parties have been given an opportunity to file comments and reply comments on the tentative conclusions reached herein.

3. Issues Raised Concerning PRTC's Applications

38. AACR contests whether, in the unique context of Puerto Rican telecommunications, PRTC's entry into off-island telecommunications markets would foster fair competition and comport with Commission policy. We have subdivided into five categories the issues relevant to AACR's arguments in opposition to PRTC's entry into off-island markets: (a) whether, given the technical status of Puerto Rico's communications network and PRTC's control over both the island network and the arragements for routing off-island traffic, PRTC's entry into off-island telecommunications markets could deprive other authorized carriers of an opportunity for reasonable access to customers and to off-island switching facilities; (b) whether the control of PRTC (along with its affiliate, PRCA) over intra-island communications raises any other issues that would justify preventing its entry into off-island markets; (c) whether PRTC's claim for entry into off-island MTS markets is called into question by its status as a government-

[45] We note, however, that if called upon to dispose of PRTC's request, we would strongly consider whether the ITT Companies' refusal to make available IRUs to PRTC in their microwave facility, coupled with their willingness to make available IRUs in the same facility to carriers and foreign correspondents with whom they do not compete, constitutes unlawful discrimination for the purposes of Section 202(a) of the Act.

owned enterprise; (d) whether PRTC's purchase of IRU interests in foreign-owned cable circuits at greater than net book cost would, absent justification, violate Commission policy; and (e) whether questions about PRTC's ability to compete fairly in international markets are raised by its receipt, subsequent to our *Canada* order, of the sole operating agreement to provide Puerto Rico-Canada service. In this section of the NPRM, we discuss these issues and reach the tentative conclusion that since conditions have not been established to ensure that PRTC would compete in off-island markets without unfair advantages and in full compliance with Commission policy, it would not promote the public interest to grant PRTC's Section 214 applications in their current form.[46] We also propose guidelines for PRTC to follow which we believe would be sufficient to ensure that its entry into off-island markets would help create conditions of customer choice competition in these markets. Finally, we solicit comments on whether the agreement for the implementation of fully integrated rates for MTS and WATS service between Puerto Rico and the U.S. mainland should be modified in the event that PRTC is authorized to provide domestic off-island MTS and WATS services.

a. Access Conditions

39. We tentatively conclude that the island communications network and PRTC's arrangements for routing off-island traffic are not adequate to allow telecommunications users to choose between carriers competing to provide direct service to and from off-island points. We propose that, as conditions of entry into off-island markets, certain requirements be imposed on PRTC to ensure the availability of reasonable access arrangements for multiple off-island carriers.

40. We tentatively conclude that PRTC should be allowed to provide off-island service only through those PRTC or PRCA end offices in which, for both originating and terminating traffic, either: (a) equal access arrangements are available for all licensed carriers; or (b) AACR, as the traditional off-island carrier, is provided premium access.[47] Currently, dialing to off-island points

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[46] We discuss, *supra*, PRTC's request that we compel the sale of IRU interests in an ITT-owned microwave facility as necessary for PRTC to gain reasonable, economic access to Canada.

[47] Under our proposal, other carriers authorized to provide off-island service must receive access equal to that of PRTC.

is generally accomplished by means of a three-digit access code.[48] International Direct Distance Dialing (IDDD) is now available on the island for over ninety percent of the local exchanges to most foreign points, including all countries to which the parties are applying to provide service; the remaining exchanges are expected to be equipped to provide this feature to all such points by mid-year 1986.[49] PRTC concedes that, for most of its local exchange end offices, it is not currently able to provide end users with their choice of off-island carrier. However, PRTC has discussed the possibility of providing interexchange carriers with Feature Group D access to end users.[50] Under Feature Group D, users of off-island MTS would be afforded the ability to presubscribe to any authorized off-island carrier. MTS calls via the chosen carrier's facilities could then be made without the need for dialing an access code other than a "0" or "1" prefix.[51] PRTC states that it is prepared immediately to begin the process of equipping all of its end office switches with Feature Group D access capability but notes that, since its island network is mainly equipped with electro-mechanical end office switches rather than electronic, stored program switching systems, this process will probably not be completed until 1991-92.[52] PRTC states that it is investigating the possibility of competition between itself and AACR by means of alternate three-digit access codes or Feature Group A, twenty-three-digit dialing. PRTC remarks that it is willing to accept a conditional Section 214 authorization to provide service to Canada through only those end offices equipped to provide customer choice competition with AACR.

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[48] There are a few exceptions to this general case: for operator-assisted or operator-handled calls in PRCA end offices, users dial "O" plus the number they wish to reach; for IDDD calls in PRCA end offices, users dial "1" plus a three-digit access code.

[49] *See* AACR, Tariff FCC No. 1, Transmittal No. 131 (received November 5, 1985). With IDDD, MTS users on the island can dial without the need of assistance from an operator points not included within the North American Numbering Plan.

[50] The Exchange Carrier Association (ECA) tariff offers switched access service in four feature group arrangements differentiated in such ways as in the type of access connection provided (line side or trunk side) and the access calling pattern (*i.e.*, the number and sequence of digits that must be dialed to access the interexchange carrier's services). ECA, Tariff F.C.C. No. 1, Section 6.2.

[51] The Feature Group D access arrangement also offers all other features commonly associated with equal access.

[52] *See* letter from Jose A. Cela, Assistant to the Vice President, Corporate Planning and Development, PRTC to Mr. Ernesto La Russa, Vice President/Director, AACR (February 14, 1985), enclosed as Exhibit 2 to Reply of AACR to Opposition of PRTC, Puerto Rico Telephone Company, File No. I-P-C-81-039-A (received June 3, 1985).

41. In Phase III of our MTS and WATS Market Structure proceeding, we imposed various requirements upon independent telephone companies (ITCs), including PRTC, to provide interexchange carriers with equal access to end users for the purpose of originating or terminating interexchange communications.[53] If PRTC is authorized to enter the off-island market in competition with AACR, PRTC would be required to implement equal access to the extent practicable. We propose that, if other potential concerns with PRTC's entry into off-island markets are successfully resolved, PRTC should be allowed to provide service through those end offices equipped to provide equal access for multiple off-island carriers.[54] Our Phase III order defined the essential features of equal access to include all services currently available to AT&T. AT&T's access arragnements were used as the benchmark for equal access because AT&T is the traditional interexchange carrier for the vast majority of domestic points. In the case of Puerto Rico, the definition of equal access should be modified to require access arrangements for multiple off-island carriers to include only those features currently available to the traditional off-island carrier, AACR. In our Phase III order, we stated that, in defining equal access, technical standards would appropriately be based on the perceptions of customers rather than on requirements of absolute methematical equality. We note that equal access encompasses the notion of non-discrimination in several ancillary areas such as installation, repair and maintenance.

42. For those end offices in which equal access is not available, we propose that PRTC be required to continue to provide AACR

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[53] Report and Order (Phase III order), CC Docket No. 78-72, FCC 85-98 (released March 19, 1985), *on reconsideration*, Memorandum Opinion and Order, FCC 86-4 (released January 8, 1986).

[54] AACR questions the feasibility of implementing equal access competition on the island under conditions where users presubscribe to a particular off-island carrier. According to AACR, PRTC's statutory monopoly over intra-island long distance traffic would provide it with an unfair advantage in capturing customers of off-island service. AACR bases this claim on the presumption that users of off-island service would shop for the convenience of utilizing a single carrier to meet their entire long distance telephone needs. Though AACR may be correct that many customers would be favorably disposed to the convenience of utilizing a single long distance carrier for off-island as well as intra-island service, we believe that customer choice in a competitive market would primarily be based instead on a comparison of the price, quality and scope of carrier offerings. Since we see no connection between PRTC's monopoly over intra-island long distance traffic and the price, quality and scope of its potential off-island offerings, we tentatively conclude that PRTC should not, if otherwise qualified, be denied authorization to enter off-island telecommunications markets solely because of its possession of this monopoly.

with the "premium" access it enjoys today. PRTC would thus be permitted to enter off-island markets through such end offices only by utilizing non-premium access arrangements, such as Feature Group A. Under industry-wide arrangements, wherever equal access is not available, the traditional MTS service carrier is entitled to obtain premium access arrangements while all new entrants receive non-premium access.[55] One key advantage in maintaining this practice in the context of Puerto Rico is that providing PRTC with non-premium access until equal access is available throughout the island would presumably stimulate PRTC's (and PRCA's) incentives to modernize the island network as soon as possible. We seek comment on what discount, if any, PRTC should receive for non-premium access.

43. We request PRTC and other interested parties to submit detailed information concerning the island network's present and feasible future capability to accommodate essentially equivalent access arrangements for each authorized off-island carrier. We particularly request data and analyses as to when such arrangements could be expected to be implemented for each type of end office switching system and for the entire island, with respect to both originating and terminating traffic, respectively. We solicit comments on why the implementation of an otherwise desirable option is not feasible in the near future. We also solicit information on the feasibility of implementing access to end users for the operators of each licensed off-island carrier. We additionally request comments on whether PRTC's toll switch can foreseeably be converted to provide equivalent access arrangements throughout the island. Moreover, we solicit comments on the benefits and detriments to the public of authorizing PRTC to provide off-island service through merely a fraction of the island's end offices. Further, we solicit comments on whether PRTC should be required to provide, for each off-island carrier, the following information: historical and projected numbers of business and residence telephone lines; and average usage per line.[56] Finally, we solicit comments on what procedure should be used for allocating the costs incurred by PRTC in implementing equal or premium/non-premium access for multiple off-island carriers.

44. We also tentatively conclude that for PRTC to be authorized to provide off-island service it must demonstrate the avail-

[55] Investigation of Access/Investiture Tariffs, 97 FCC 2d 1082, 1227-28, n. 3 (1984).

[56] *See* GTE Sprint Communications Corporation, *et al.*, Joint Petition for Expedited Rulemaking, CC Docket No. 85-348, FCC 86-280 (released June 19, 1986).

ability of reasonable access to off-island switching facilities for multiple carriers. An obvious risk of authorizing PRTC, which possesses a monopoly over off-island switching and routing, to provide off-island services is that it will route off-island traffic intended for another carrier to its own overseas facilities. This problem would be resolved successfully if PRTC can establish an access arrangement which automatically switches off-island calls to the carrier identified by the dialed access code. Nevertheless, several concerns would remain with PRTC's controlling off-island switching, routing and signalling. We are concerned, for example, that if PRTC were authorized to provide off-island service at this time, its monopoly over off-island switching and traffic routing would enable it, with a minimum of effort, to acquire valuable proprietary information on its competitors (*e.g.* names of customers, calling patterns of larger customers, routing arrangements with correspondents) due to the ability of its international switch to isolate data on all international calls. Consider also that the advantages of competition are minimized when a single off-island carrier supplies all switching and traffic routing services off of the island and thereby may determine in large part the cost and quality of competitors' offerings to end users.

45. To resolve these concerns and enable each authorized carrier to possess a reasonable opportunity to compete in off-island markets, we tentatively conclude that each carrier which so desires must be allowed to construct, own and operate an off-island switch. The switch would interconnect with PRTC's toll switch so that the carrier will have access to end users on the island for both originating and terminating off-island traffic. If the carrier so desires, its switch would also be located on the island. In a corresponce to PRTC, dated January 22, 1985, AACR stated its intention to install its own off-island switch in 1985 and requested interconnection with PRTC's local network.[57] We tentatively conclude that PRTC shall not be authorized to enter off-island markets until it has satisfied all reasonable obligations in interconnecting AACR's proposed switch. We note that an integral part of interconnection is providing sufficient information about the island network such that AACR can effectively utilize its off-island switch.[58] We request commenters to discuss the

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[57] Letter from Ernesto La Russa, Vice President/Director, AACR to Mr. J. Cela, Assistant Vice President for Corporate Planning and Development, PRTC, enclosed as Exhibit 1 to Reply of AACR to Opposition of PRTC, Puerto Rico Telephone Company, File No. I-P-C-81-039-A (received June 3, 1985). Subsequent negotiations between the parties have proved ineffectual.

[58] The Commission has considered adequate provision of network information a

extent to which PRTC should be required to disclose network information to AACR for the purpose of interconnection.

b. Effects of PRTC's Local-Carrier Status

46. As the consequence of an anti-trust settlement agreement, local exchange carriers formerly owned by AT&T are precluded from entering long distance markets.[59] However, this Commission has no policy that prohibits carriers from providing both local and long distance service, and we tentatively conclude that, in light of the conditions characterizing the Puerto Rican telecommunications marketplace, PRTC should not be barred from entering off-island markets solely by virtue of its local-carrier status. As we stated *supra* in paragraphs 26–30, we tentatively find that additional competition in various markets is feasible and, if appropriately implemented, would substantially benefit end users by stimulating price competition as well as the development of innovative and higher quality service offerings. PRTC is the sole facilities-based carrier applying with the Commission to provide overseas service from Puerto Rico in competition with AACR and, based on our initial review of its applications, appears to meet all of the minimum requisite qualifications for Section 214 authorization.[60] We note also that there exists considerable precedent allowing independent local exchange carriers to enter overseas markets.[61]

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crucial element of its pro-competitive policies. *See* Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, Order, CC Docket 85-26, FCC 95-509 at paras. 49-54 (released September 30, 1985); and Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies, Notice of Proposed Rulemaking (BOC/ITC Notice), FCC 86-113 at paras. 42-46 (released March 28, 1986).

[59] AACR v. FCC, 736 F.2d. at 759, citing United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 103 S. Ct. 1240 (1983).

[60] *Supra*, para. 24.

[61] The Hawaiian Telephone Company (HTC), a subsidiary of the GTE Corporation which possesses a monopoly over the provision of local exchange service in Hawaii, is authorized to provide telephone service between Hawaii, on the one hand, and offshore U.S. points and foreign points, on the other. United States v. GTE Corp., 603 F. Supp. 730, 749-752 (D.D.C. 1984). HTC provides data communications services between Hawaii and Guam along with the Guam Telephone Authority, another local telephone monopolist. Guam Telephone Authority and Hawaiian Telephone Company, Memorandum Opinion, Order, Authorization and Certificate (Guam/Hawaii order), File No. I-P-C-81-028 (released February 5, 1982). PRTC provides private line services between Puerto Rico and the U.S. mainland. Puerto Rico Telephone Company, Memorandum Opinion and Order, File Nos. W-P-C-4952, 781-DSE-P/L-83 (released December 28, 1983), *application for review pending*; Puerto Rico Telephone

47. We are not persuaded by AACR that PRTC, as a local monopoly, should be restricted from providing off-island service as the local Bell Operating Companies (BOCs) have been restricted from providing inter-LATA services.[62] In the case of PRTC, we believe that adherence to the guidelines we shall adopt in this rulemaking proceeding should ensure that its entry into off-island markets would not be anti-competitive. We also have tentatively concluded that entry by PRTC would, under appropriate conditions, substantially advance competition and benefit the public in certain off-island markets. Hence, assuming that the required amendments are made in PRTC's application, we see no need in imposing on PRTC the restrictions placed on the BOCs.

48. The monopoly which PRTC (along with its affiliate PRCA) possesses over Puerto Rico's intra-island service nevertheless raises concerns that PRTC, if authorized to provide off-island service would subsidize its off-island activities by shifting costs associated with these activities to its monopoly intra-island activities. Such subsidies would undermine competition in off-island markets by, for example, enabling PRTC to set prices beneath its actual costs for providing off-island services and underprice its competition. Both PRTC and AACR recognize in the pleadings to PRTC's amended Canada application that the ability for cross-subsidization must be minimized. PRTC suggests that it could effectively accomplish this goal by maintaining separate books of account to separate the costs and revenues of its monopoly intra-island activities from those of its competitive off-island activities. AACR, on the other hand, urges that PRTC must instead be required to create a structurally and operationally separate subsidiary to provide intra-island services. AACR proposes that the requirements for structural separation be

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Company, Memorandum Opinion and Order (PRTC Campo order), File Nos. W-P-C-4587, 1640-DSE-P/L-82 (released December 28, 1983), *application for review pending*. Two subsidiaries of the ITT Corporation, ITTCIVI and the Virgin Islands Telephone Company, serve as the off-island and local exchange carriers, respectively, for the U.S. Virgin Islands. *See also* MTS and WATS Market Structure, 81 FCC 2d at 186, where the Commission states that some of the larger local independent telephone companies "would appear to be prime entry candidates [to become independent factors in interexchange markets]."

[62] United States v. American Tel. and Tel. Co., 552 F. Supp. at 186-189 (D.D.C. 1982). As an exception to this general restriction, the BOCs are allowed to provide interstate, interexchange service in two locations: New York-Northern New Jersey and Philadelphia-Southern New Jersey. United States v. Western Electric Co., 569 F. Supp. 990, 1018-19 (D.D.C. 1983) (corridors proposed); 569 F. Supp. 1057, 1107-10 (D.D.C. 1983) (corridors approved), *aff'd per curiam sub nom*, California v. United States and New York Dep't of Pub. Serv. v. United States, 104 S. Ct. 542 (1983).

modeled after the consent decree reached between the U.S. Government and GTE Corporation and conditionally approved in *United States v. GTE Corporation, supra*, footnote 61, in which examples of prohibited parent/subsidiary interactivities include: (a) engaging in sales (after initial capitalization) of assets, operations or lines of business between parent and subsidiary; (b) maintaining common staff, facilities, premises or assets; (c) furnishing administrative, engineering or research and development services between parent and subsidiary; (d) providing joint information or telecommunications services to the public; and (e) jointly marketing information or telecommunications services to the public.

49. After analyzing both parties' recommendations, we tentatively conclude that the opportunity for PRTC to cross-subsidize its off-island activities can most appropriately be minimized by requiring the use of cost allocation mechanisms rather than structural separation between PRTC's intra-island and off-island operations. While structural separation forces cross-subsidization to occur across corporate boundaries, thus making the activity more difficult to accomplish and easier to detect, we believe that the costs of imposing structural separation requirements would unnecessarily impair PRTC's ability to compete in off-island markets and thereby prevent off-island telecommunications users from reaping the benefits of competition. The most apparent cost of structural separation restrictions lies in the direct duplication of personnel and facilities. Moreover, in the absence of such restrictions, PRTC could presumably realize economies resulting from the sharing of inputs (*i.e.*, equipment, personnel skills, technology) that go into providing both overseas and local communications service. By reducing the flow of information inside the firm and eliminating joint marketing endeavors, these restrictions would also increase costs of developing and marketing new services and would hamper the responsiveness of PRTC to marketplace signals. These costs of structural separation would not only impair PRTC's ability to compete in off-island markets but would also eliminate opportunities for PRTC to utilize inputs from its off-island activities to make its intra-island activities more productive.

50. We believe that PRTC's utilization of the existing cost allocation procedures prescribed by the Rules would provide adequate protection for off-island competition and telecommunications users without unduly burdening PRTC's ability to compete vigorously in off-island markets. Part 67 of the Rules prescribes the allocation of PRTC's costs between the "intrastate" and

"interstate" categories. PRTC's off-island costs for both cable and satellite transmission would be allocated to the "interstate" category, which, in the case of Puerto Rico, comprises off-island domestic and international services.[63] Part 69 of the Rules establishes rules for allocating costs in the development of access charges attributable to the local portion of interstate (off-island) telecommunications services and facilities. Tariffs for off-island services are required to recover the costs associated with the use of both local facilities and overseas facilities.[64] To the extent PRTC's utilization of Parts 67 and 69 to allocate costs cannot ensure that cross-subsidization would be eliminated entirely, we point out that PRTC would appear less likely to engage in such a practice than would a similarly situated privately-owned carrier. PRTC is, after all, entirely owned by the government of Puerto Rico and therefore accountable to the people of the Commonwealth. For it to shift significant costs associated with its off-island activities to its intra-island activities in order to subsidize the former would clearly entail risking jeopardizing the infrastructure of Puerto Rican telecommunications, which it must develop fully in order to be judged as a properly functioning enterprise by the Puerto Rican people.

51. Further, we propose that PRTC be required to disclose publicly: network technical information regarding the introduction of new network configuration in an existing network service; information involving joint research and development; and any other information that affects or relies on network interface and network interoperability.[65] We solicit comments on this proposal. Additionally, we invite comments on PRTC's possession and potential use of its customer proprietary network information (CPNI). At present, PRTC's databases contain CPNI on the network services of virtually all customers. We solicit comments on whether PRTC could use this information to identify potential customers and tailor proposals to particular customers. We

[63] We do not propose guidelines for allocation of costs between PRTC's off-island domestic activities and its international activities because there appears to be little danger of cross-subsidization between the two.

[64] We have initiated a rulemaking proceeding to consider, for telephone companies and their affiliates, the separation of costs of regulated telephone service from the costs of nonregulated activities. *See* Notice of Proposed Rulemaking, CC Docket No. 86-111 (released April 17, 1986). We shall consider any cost allocation procedures discussed in that proceeding which are relevant to this rulemaking.

[65] *See* BOC/ITC Notice, *supra*, n. 58 at paras. 42-46. We tentatively conclude that the disclosure requirements proposed for the separate subsidiaries of the BOCs be applied to the off-island activities of PRTC.

further invite parties to suggest disclosure requirements, if necessary, that might address our concerns regarding CPNI while at the same time protect customer's rights to privacy.[66]

c. Effects of PRTC's Status as a Government-Owned Carrier

52. We turn now to AACR's contention that PRTC's qualifications to provide off-island telecommunications service in competitive markets are undermined by its status as a government-owned entity. To the extent this contention is based on an alleged Commission policy against government ownership of commercial communications service, we tentatively conclude that PRTC should not be disqualified from providing off-island service merely because of its government-owned status. AACR correctly states that we favor private over public ownership of long distance facilities.[67] Our policy has not been, though, to prohibit government ownership of facilities. Our "primary concern is to ensure that the benefits of the best possible service at reasonable rates are made available to the public."[68] When this goal is best accomplished through the authorization of publicy-owned entities, we have not been hesitant to authorize these entities as interexchange carriers.[69] In the case of PRTC, our preliminary review of its off-island applications reveals that it appears to possess the requisite minimum legal, financial and technical qualifications to provide off-island telecommunications service and that, if appropriate constraints are placed on its entry, it could substantially increase competition in the relevant markets and improve service to end users. Under these circumstances, we tentatively find that it would not be a proper application of Commission policy to disqualify PRTC from providing off-island telecommunications service merely because it is a publicly-owned entity.

53. AACR also claims that PRTC's qualifications to provide off-island service are critically undermined by the substantial pecuniary advantages it enjoys as a government-owned entity. AACR specifically states that Puerto Rican law provides for the

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[66] *Id.* at paras. 47–50.

[67] United States Postal Service, 71 FCC 2d 100, 103 (1979); RCA Global Communications, Inc., 56 FCC 2d 660, 692–93 (1976); Comsat Study, 77 FCC 2d 564, 694 (1980).

[68] PRTC Campo order, *supra*, n. 61 at para. 20.

[69] In recent years, we have authorized PRTC to provide off-island private line services (*supra*, n.61), PRCA to provide off-island telex and mailgram services (*supra*, n.3) and the Guam Communications Authority to provide data communications services between Guam and Hawaii (*supra*, n.61).

subsidization of PRTC, as a company wholly owned by the Puerto Rico Telephone Authority (PRTA), "a government instrumentality of the Commonwealth of Puerto Rico,"[70] through: (a) exempting PRTC from various Commonwealth and municipal taxes and fees which are assessed to private entities operating in Puerto Rico; and (b) enabling PRTC to raise capital through the sale of tax exempt bonds, at twenty-thirty percent beneath normal bond interest rates. After examining the government cost-subsidy issues presented by PRTC's applications, we tentatively conclude that the applications need not be amended to account for PRTC's alleged subsidies.

54. AACR and other private entities doing business in Puerto Rico are required to pay several different types of taxes to the Commonwealth and local municipalities such as income taxes, excise taxes, property taxes,[71] license or franchise taxes and gross receipt taxes.[72] By contrast, Title 27, Section 411 of the laws of Puerto Rico exempts PRTC and all other wholly owned subsidiaries of PRTA from requirements to pay "any Commonwealth or municipal taxes, excises, licenses or assessments on the property acquired by any of them or under the jurisdiction, control, possession or supervision of any of them."[73] Such companies are, however, required to make payments in lieu of taxes of "an amount equal to the taxes on any and all [of their] property . . . that would have been due to the municipalities for the current fiscal year."[74] Note also that PRTC's Annual Report Form M, Year Ended December 31, 1984, indicates that PRTC does pay some Commonwealth and municipal taxes (*e.g.*, social security taxes, automobile license fees). With respect to AACR's allegation that PRTC receives government subsidies in its cost of capital, PRTC responds that any such advantages: (a) result from legislative determinations that should be respected; and (b) should be viewed in relation to the ease in which AACR is able to raise equity capital.

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[70] 27 Laws of Puerto Rico Annotated 404 (1985).

[71] Municipal property taxes are required to be paid on an *ad valorem* basis, regardless of whether the amount assessed exceeds the entity's net revenues.

[72] All domestic corporations, including private entities, are entitled to a credit against federal income tax liability if a sufficient proportion of their income is derived from activities conducted in Puerto Rico. U.S. Internal Revenue Code, 26 U.S.C. § 936 (1985).

[73] *Id.*, § 411.

[74] *Id.* No payments for a given calendar year are required to be made in excess of the amount of the company's "net revenues" (as defined in Section 411) available from that calendar year; deficits in the payments from previous years need not be made up.

55. Virtually the same government subsidy concerns raised by AACR with respect to PRTC were raised by RCA Global Communications, Inc. against the ownership of facilities by the Guam Telephone Authority.[75] In the Guam/Hawaii order, at page 6, we stated that:

> Absent any Commission policy against governmental ownership of facilities, it follows that a governmental entity's possession of potential advantages by virtue of its status alone should not preclude authorization pursuant to Section 214. The Commission's primary concern is to ensure that the benefits of the best possible service at reasonable and nondiscriminatory rates are made available to the public.

As AACR has not demonstrated how the alleged cost subsidies received by PRTC would impair the provision of service to the public, we propose that PRTC's Section 214 applications need not be amended to account for its alleged subsidies.

d. Purchase of IRUs in Foreign Owned Cable Circuits at Greater Than Net Book Cost

56. In its amended Canada application, PRTC proposes to acquire IRU interests in sixteen circuits in the St. Thomas III cable from Teleglobe Canada at original cost plus interest. Nevertheless, as AACR has argued, there exists established Commission policy in favor of requiring overseas facilities to be purchased by U.S. carriers at no greater than net book cost (depreciated original cost).[76] According to Commission policy, a carrier proposing to purchase IRUs at greater than net book cost must present specific evidence demonstrating why the arrangement it proposes furthers the public interest. No evidence of this kind was presented by PRTC in response to AACR's argument challenging its proposed IRU transaction with Teleglobe Canada. Though PRTC's proposal appears inconsistent with Commission policy, we shall not address this matter in the context of this rulemaking proceeding. PRTC's proposal would most appropriately be resolved in the context of any future evaluation of PRTC's amended Section 214 Canada application.

e. Operating Agreements with Foreign Correspondents

57. PRTC's amended Canada application raises additional concerns based on the events transpiring after its original Canada

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[75] The Guam/Hawaii order, *supra*, n. 61.

[76] AT&T Co., File No. I-P-C-81-054, Mimeo No. 1398 at 2 (released January 4, 1982). *See also* American Telephone and Telegraph Co., 13 FCC 2d 235, 248 (1968).

application was granted in 1983. In that year, following the release of the *Canada* order, AACR's correspondent in Canada, the Transcanada Telephone System, informed AACR that it would terminate their correspondent relationship as soon as PRTC begins to provide service.[77] Possessing a correspondent relationship is a necessity for any U.S. carrier to provide services to or from a foreign market. We tentatively plan on reevaluating any authorization eventually granted to PRTC to provide services to a particular foreign point if it results in PRTC's becoming, at the expense or less of another U.S. carrier, the sole U.S. carrier to obtain an operating agreement with a foreign correspondent for the purpose of providing telecommunications service to and from Puerto Rico. The competitive advantages of authorizing PRTC to enter international markets would appear to be eliminated if, as a result, AACR and other competitors were foreclosed from participating in these markets.

f. Domestic Rate Integration

58. The existing agreement for the implementation of fully integrated rates for MTS and WATS service between the U.S. mainland and Puerto Rico/Virgin Islands was adopted in 1979, at a time when service off the island was provided only by AACR.[78] We solicit comments as to whether this agreement should be modified in the event that competition is established for off-island domestic service. We specifically request comments on whether PRTC, if authorized to provide off-island service, should be subject to the rate integration arrangements currently applying to AACR.

C. Earth Station Applications

59. In evaluating applications to construct, operate and establish channels through international earth stations, we would first examine an applicant's minimum legal, financial and technical qualifications under Sections 214 and 308(b) of the Act. Applications by minimally qualified carriers shall then be evaluated in terms of whether they are required by the public convenience and necessity.

60. We tentatively conclude that the institution of international Standard A earth station service in Puerto Rico would promote the public convenience and necessity. The provision of such

[77] Reply of AACR, Puerto Rico Telephone Company, Tariff FCC No. 2, Transmittal No. 3, at 3 (received August 10, 1984).

[78] Common Carrier Separations Procedures, 72 FCC 2d 715 (1979).

service would, we believe, enable consumers of international telecommunications offerings to and from Puerto Rico to enjoy the aforementioned benefits of establishing direct circuits between Puerto Rico and an expanded number of overseas points. It would appear that the operation of international earth station facilities would be an important element in achieving rapid growth in international telecommuncations traffic on the island. Further, our initial examination of the record reveals that demand for international service on the island is more than adequate to accommodate economically a single Standard A station.

61. We also tentatively conclude that a carrier's Title III earth station application should not be granted unless we find its accompanying Section 214 application to be in the public interest. No purpose would be served to authorize construction of a Title III earth station without also authorizing the requisite lines of communication from that earth station. We note further that all of the concerns we have raised in our discussion of PRTC's Section 214 applications, *supra* (except the concern that PRTC could enter into an unacceptable arrangement for purchasing IRUs in foreign owned cable circuits) apply fully to its Section 214 application to establish circuits in its proposed international earth station. Hence, we tentatively conclude that before international earth station. Hence, we tentatively conclude that before these concerns are satisfactorily resolved, PRTC's Title III application should not be granted.

62. Our initial review of the two pending Title III applications filed by the current dominant off-island carrier and a local monopoly carrier indicates that demand may not be adequate at this time to accomodate economically *two* Standard A stations and, hence, that operation by both PRTC's and AACR's Title III proposed earth stations may not be in the best interests of the ratepayers. Each applicant's projections of the costs to construct, operate and establish the appropriate number of channels through its proposed Standard A earth station do not clearly reveal whether the construction of one Standard A station (Scenario 1) or two Standard A stations (Scenario 2) is appropriate in light of the demand for international satellite services involving Puerto Rico.[79] Therefore, we are unable to reach tentative conclusions from the record as to the effect of authorizing two Standard A

[79] AACR projects that demand in the market it proposes to serve shall grow from 146 circuits in 1987 to 175 circuits in 1990. PRTC projects that market demand for its proposed service shall grow from 155 circuits in 1987 to 224 circuits in 1991.

international stations on the price, quality, scope and market-responsiveness of telecommunications offerings to consumers. Further, neither applicant explicitly addresses in the pleadings whether operation by both proposed earth stations would be economically feasible.[80]

63. Our eventual resolution of this issue shall be based on the public interest criteria specified in our *Earth Station Ownership* order, 100 FCC 2d 250 (1984), and other revelant criteria for evaluating the benefits and detriments of licensing multi-purpose earth stations. In *Earth Station Ownership*, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate earth station facilities.[81] We stated there that we would continue to closely scrutinize applications for multi-purpose earth stations by analyzing the impact of granting such applications on the provision of earth station and space segment services. We decided that such an analysis should be conducted by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible deteriments (reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present. Our evaluation would not be confined merely to considerations of short run economic viability but would probe the expected long run impact under each scenario on the price, scope, quality and market responsiveness of service offerings.[82] We would also weigh heavily the benefits of competition discussed *supra*, paragraphs 26-30, and evaluate the ramifications of the possibility that competition between direct circuits would stimulate market demand to levels not foreseeable in the current climate of international Puerto Rican telecommunications.[83]

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[80] Each applicant contends that the other applicant's proposed station is anti-competitive and thereby contrary to the public interest. Both applicants provide demand, revenue and cost data to support the viability of one Standard A international earth station on the island, but do not discuss the viability of two such stations.

[81] Earth Station Ownership, 100 FCC 2d 250 (1984).

[82] *See* AT&T Co., 84 FCC 2d 303 (1981). We there decided that the construction of a fiber optic cable facility between New York and Washington would, in a long run, promote the public interest even though market demand would probably be insufficient to assure short run economic viability of the facility.

[83] As the D.C. Circuit stated in Washington Utilities and Transp. Com'n v FCC, 513 F .2d 1142, 1159 (1975), *FCC v. RCA* "stands for the proposition that while wasteful duplication is generally to be avoided, duplication is not wasteful where a certifying agency appropriately concludes that competition is reason-

64. We request that each applicant (as well as other interested parties) submit data and analyses further justifying its projections of market demand, costs and revenues for its proposed earth station. Appropriate supporting data should be included. Capital cost data need not be resubmitted unless changed materially. We also request that each applicant project the relative effects under both scenarios on its own costs and revenues in providing satellite earth station service and on expected market demand. We further solicit any comments on appropriate criteria for reaching determinations of economic feasibility.

65. We are required under the Act to grant either or both applications in the event that we find the application(s) to promote the public convenience and necessity. Sufficient market demand or a competitive marketplace would make a grant of both applications possible. If, on the other hand, we determine that we should not authorize two earth stations, we would be faced with multiple options.

66. First, we could designate both of the applications for a full comparative hearing. As full evidentiary hearings are generally time consuming and expensive, it would be inappropriate to hold such hearings if it is not foreseeable that the findings of a hearing examiner could affect our ultimate public interest determination.

67. Second, we may reach a public interest determination in this rulemaking proceeding that our consideration of the applications in light of Commission policy clearly indicates that one of the applicants should be deemed ineligible to apply for an earth station at this time.[84] The Supreme Court has noted that where agency determinations are "of a judgmental or predictive nature . . . complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecase of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' (citation omitted)."[85]

68. We request interested parties to comment on the appropriate factors for determining, in the event that grant of both applications is deemed not feasible, which of the two options we discussed is appropriate and why. We also request comments on whether the substantial concerns raised by PRTC's applications

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ably feasible and may be expected to have some beneficial effect . . . ".

[84] *See generally* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Domestic Satellite Earth Stations, 81 FCC 2d 304, 314-316 (1980).

[85] FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 813-14 (1978).

can be resolved successfully in the very near future. We further solicit comments on whether it would harm the public to withhold the introduction of international earth station service on the island for an indeterminate and possibly lengthy period of time, while PRTC satisfactorily amends its application. We are concerned that during the time needed for PRTC to make the required amendments, demand may have grown sufficiently to accomodate economically two Standard A international earth stations. Moreover, we request comments examining the feasibility and desirability of an additional option: that a Standard A international earth station on the island be constructed, operated and owned jointly by both PRTC and AACR or by another consortium of carriers. Finally, we solicit comments analyzing the relative desirability of competition between two Standard B international earth stations on the island as compared to other feasible options.

IV. Miscellaneous Provisions

69. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Rules, 47 C.F.R. §1.415, 1.419 (1985), on or before August 25, 1986 and September 15, 1986, all interested persons may file comments and reply comments, respectively. Before final action is taken in this proceeding we shall consider all relevant and timely comments filed. In reaching a decision on this matter we may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of our reliance upon such information is noted in the Report and Order. Participants must file an original and five copies of all comments. If participants wish each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. They should serve reply comments upon all those who file comments in this rulemaking. Comments and reply comments should be sent to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 10554.

70. For purposes of this notice and comment rulemaking proceeding, the Commission has determined that all *ex parte* contacts are prohibited from the time the Commission adopts this

notice of proposed rulemaking until the time the matter is no longer subject to Commission consideration or court review. *See* 47 C.F.R. § 1.1207(d). In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or member of the Commission's staff which addresses the merits of the proceeding.

71. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354), we hereby certify that Sections 603 and 604 of the Act do not apply because these rule changes will not, if promulgated, have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. Sections 603, 604, 605(b) (1976).[86]

V. Ordering Clauses

72. Accordingly, pursuant to Sections 4(i), 4(j), 201, 202, 214, 308-310, 319 and 403 of the Communcations Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 214, 308-310, 319 and 403 (1976), IT IS ORDERED that a rulemaking looking toward the development of policies we shall apply in acting on applications by common carriers for facilities to provide telecommunications service off of the island of Puerto Rico is hereby instituted.

73. IT IS FURTHER ORDERED that the Application filed by the Puerto Rico Telephone Company (File Nos. I-P-D-8 and I-P-C-48) to provide message telephone service and Wide Area Telephone Service between Puerto Rico and points in or reached via the U.S. mainland and between Puerto Rico and the U.S. Virgin Islands is hereby DISMISSED consistent with our decision herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[86] The Secretary shall provide a copy of the above certification and statement to the Chief Counsel for Advocacy of the Small Business Administration and shall cause said certification and statement to be published in the Federal Register.

Declaratory Ruling
Private Land Mobile Service
State and Local Control

Request for Declaratory Ruling to find a multiple licensed business radio station in Morgan City, Louisiana is functioning as a private land mobile service within Sec. 331(c)(1) of Communications Act and not subject to state rate and entry regulation granted. Commission found cease and desist order issue by Louisiana PSC without force and effect.

Data Com. Inc.

FCC 86-315

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

DATA COM, INC.; and AMERICAN WELDING SUPPLY, INC., Licensee of Station KNBP-212 in the Business Radio Service

DECLARATORY RULING

Adopted: July 7, 1986; Released: July 14, 1986

BY THE COMMISSION: COMMISSIONER DENNIS NOT PARTICIPATING.

INTRODUCTION

1. The Commission has before it for consideration a Request for Declaratory Ruling, filed on June 4, 1985, by Data Com, Inc. (Data Com) and American Welding Supply, Inc. (American) (sometimes jointly referred to as petitioners). Petitioners ask the Commission to find that a multiple licensed business radio station in Morgan City, Louisiana is functioning as a private land mobile service within Section 331(c)(1) of the Communications Act, as amended. Petitioners further ask us to find that the system is not subject to state rate and entry regulation and, thus, to declare null and void a cease and desist order issued by the Louisiana

Public Service Commission (PSC) against Data Com.

2. We have examined the Data Com system and conclude that it qualifies as a private land mobile radio system pursuant to Sections 3(gg) and 331(c)(1) and (3) of the Communications Amendments Act of 1982, 47 U.S.C. §§153(gg) and 332(c)(1) and (3).[1] Private land mobile radio systems are exempt from state and local rate and entry regulation by Section 331(c)(3) of the Act. Accordingly, we find the cease and desist order issued by the Louisiana PSC without force and effect.

BACKGROUND

3. Data Com services a multiple licensed private land mobile paging system. Under a multiple licensing arrangement, individually licensed Business Radio Service eligibles share a single base station transmitter. *See* 47 C.F.R. 90.185. The Data Com system provides service under a three-party arrangement. Data Com provides the radio transmitter, control point equipment and paging receivers to licensed system users for a monthly fee. Tri-City Answering Service (Tri-City) relays paging messages from outsiders to the individually licensed end users of the Data Com system. A party wishing to reach a Data Com licensee telephones Tri-City using the public switched telephone network (PSTN) and gives the message to a Tri-City employee. The Tri-City employee relays this message to its intended recipient by activating the Data Com transmitter through a private radio frequency link. There is no connection between the Data Com transmitter and the PSTN, so a caller cannot directly page someone using the Data Com system.

4. On October 26, 1982, the Louisiana Public Service Commission (PSC) issued a cease and desist order restraining Data Com from providing paging service until it obtained a certificate of convenience and necessity. The PSC found that Data Com was operating "for hire", as that term is defined by the Louisiana Revised Statutes, without the certificate of convenience and necessity required by that statute. Section 45:1501C of the Louisiana Revised Statutes provides:

> The term "radio common carrier" when used in this Chapter includes every corporation, company, association, partnership and persons and lessees, trustees, or receivers appointed by any court whatsoever owning, operating or managing a radio common carrier or public "for hire" radio service engaged in the business of providing a servie of radio communica-

[1] P.L. 97-259, 96 Stat. 1087 (1982); *See Conference Report No.* 97-765, 97th Cong., 2nd Sess., page 52, August 18, 1982.

tions between mobile and base stations, between mobile and land stations, including land line telephones, between mobile stations or between land stations, but not engaged in the business of providing a public land line message telephone service or a public message telegraph service.

5. On June 15, 1983, the United States District Court for the Middle District of Louisiana issued an order restraining the Louisiana PSC from enforcing the cease and desist order against the Data Com system. That order was extended pending the outcome of *Auto Page, Inc. v. Louisiana PSC*,[2] before the United States Court of Appeals for the District of Columbia Circuit. *Auto Page* also involved a private land mobile radio paging system against which the Louisiana PSC had issued a cease and desist order that was stayed by the United States District Court for the Middle District of Louisiana. *Auto Page* was referred by that court to us on May 20, 1983, under the doctrine of primary jurisdiction. After receiving comments from interested parties, we ruled that the Auto Page system was a private radio system exempt from state and local rate or entry regulation by §§331(c)(1) and (3) of the Communications Act, as amended.[3] Bellar Communications, of which Auto Page was a wholly owned subsidiary, subsequently sold its equipment to Southern Message Service, a radio common carrier, and Auto Page ceased doing business. Therefore, the United States Court of Appeals for the D.C. Circuit found the case to be moot and the Commission's declaratory ruling was vacated by that Court in April 1985.[4]

6. On June 4, 1985, Data Com and American Welding Supply filed their Request for Declaratory Ruling. On July 10, 1985, the Commission filed a Memorandum as Amicus Curiae with the District Court for the Middle District of Louisiana suggesting that it refer the *Data Com* case to the Commission for exercise of its primary jurisdiction, as it had previously done in the *Auto Page* case. On January 30, 1986, the District Court referred the issues in this case to us so that we could rule on the regulatory status of Data Com for the court's benefit. Order of Referral, January 30, 1986, case number 83-0650.

Discussion

7. The issue before us is whether the radio service described above qualifies as a private land mobile radio system. If it does,

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[2] Civil Action No. 82-1143-A, minute entry of May 20, 1983.

[3] *Declaratory Ruling in the Matter of Auto Page, Inc.*, 48 Fed. Reg. 34,804 (August 1, 1983).

[4] *See Radiofone, Inc. v. FCC*, D.C. Circuit No. 83-1773, Order of April 19, 1985.

the Louisiana PSC is preempted by Section 331(c)(3) of the Communications Act from imposing rate or entry regulation on that system. Based on our review of the pertinent sections of the Communications Act, we find that Data Com's paging system is a one-way service to mobile and portable stations and is private within the meaning of Sections 3(gg) and 331 of the Communications Act.[5]

8. Congress added these provisions to the Communications Act in 1982 to accomplish three goals: (1) to define private land mobile service; (2) to distinguish between private and common carrier land mobile service; and (3) to delineate between federal and state authority over these services. Congress adopted these amendments to resolve continuing controversies between the FCC and states over the boundaries of our respective regulatory jurisdictions.[6]

9. There is no question that Data Com's service meets the statutory definition of a private land mobile service. Under Section 3(gg), a private land mobile service is one that:

> provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative or multiple basis) for private one-way or two-way land mobile radio communications by eligible users . . .

As noted previously, the Data Com system consists of base, portable and control stations that together are used to provide paging service to eligible licensees of station KNBP-212. The multiple licensed land mobile radio transmitter leased from Data Com is used to provide one-way paging service to mobile and portable stations of users, each of whom is eligible and licensed in the Business Radio Service.

10. Section 331(c)(1) of the Act creates a functional test of private carriage: in effect, the test is whether an entity providing private land mobile radio service is engaged in the resale of telephone service or facilities. The determination of whether a land mobile system is private or common carrier turns on whether

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[5] The Communications Amendments Act of 1982, *supra* note 1.

[6] In so doing, Congress approved earlier FCC decisions creating a private radio service regulatory classification and permitting such service to be provided on a commercial basis. *See Report and Order*, Docket No. 18262, 46 FCC 2d 752 (1974), (authorizing provision of service on a private, non-common carrier basis), *recon. denied.*, 55 FCC 2d 771 (1975), *aff'd sub nom., NARUC v. FCC.*, 525 F. 2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). By enacting Section 331, Congress superseded the *NARVC* test as applied to the private land mobile services.

the system is interconnected[7] with the telephone network and, if interconnected, whether the entity providing the interconnection is reselling telephone exchange or interexchange service or facilities.[8] The fact that Data Com's service may be held out indiscriminately to users on a commercial basis does not undermine its status as a private system. Nor does the fact that Data Com itself is not a licensee detract from this finding. Congress specifically noted that "no person participating in the private land mobile services, whether as a licensee, equipment supplier or otherwise, shall be classified as a common carrier with respect to these services." *Conference Report, supra* note 1, at page 54. This conclusion is affirmed by reference to Section 331(c)(1), which provides in pertinent part:

> private land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis . . .

11. Data Com does not provide interconnected service with a telephone exchange or interexchange service or facility. As noted above, callers interested in paging licensees of the Data Com system must first call an employee of Tri-City Answering Service, who in turn contacts the party being paged by activating the Data Com radio transmitter. There is no interconnection between telephone facilities and Data Com's radio facilities, and thus, the service involves no offering or resale of telephone service. *See* 47 C.F.R. 90.7. Therefore, the Data Com system falls in the definition of a private carrier as defined by Congress in Sections 3(gg) and 331(c)(3) of the Communications Act.

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[7] The term "interconnection" is defined as the connection through automatic or manual means of private land mobile stations with the facilities of the PSTN to permit the transmission of messages or signals between points in the wire line or radio network of a public telephone company and persons served by private land mobile radio stations. *See* 47 C.F.R. §90.7 (1985). Manual interconnection occurs when a control operator physically makes the connection between the telephone and the mobile unit, as distinguished from the Data Com system, where there is no connection between the telephone line and the mobile unit.

[8] *Conference Report, supra,* note 1, at page 55. This does not mean that private land mobile systems are prohibited from using interconnected operations. On the contrary, the use of interconnection by private land mobile radio systems is specifically allowed, provided it is done within the parameters of Section 331(c)(1). The Commission's interpretation and application of Section 331(c) to private radio systems has been upheld by the U.S. Court of Appeals in two separate cases. *See Telocator Network of America v. FCC,* 761 F.2d 763 (D.C.Cir. 1985), and *Telocator Network of America v. FCC,* 764 F.2d 926 (D.C. Cir. 1985).

12. The only remaining question is the scope of authority reserved to the states under Section 331 with respect to private land mobile operations. Congress spoke unambiguously to this point as well:

> No state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile radio service . . . [9]

Because the Data Com system is a private system, we find the order of the Louisiana PSC, which restrains Data Com from operating until it obtains a certificate of convenience and necessity from the state PSC, to be without legal force or effect. American Welding Supply and the other licensees are duly authorized by the Commission to provide and use private land mobile radio service and have complied with the statute and applicable rules. This system may continue to operate irrespective of any ruling to the contrary at the state level.

13. Accordingly, IT IS HEREBY DECLARED, pursuant to Sections 1, 3(gg), 4(i), 4(j), 303(r) and 331(c) of the Communications Act of 1934, as amended, that the private radio system licensed to American Welding Supply, Inc., et al., and serviced by Data Com, Inc. and Tri-City Answering Service, Inc. is duly licensed under the Communications Act of 1934, as amended, to offer private land mobile radio service; that the offering described herein is properly classified as private land mobile radio service within the scope of Section 331(c)(1) of the Communications Act of 1934, as amended; and that any entry or rate regulations of such offering by a state or local government are without force and effect pursuant to Section 331(c)(3) of the amended Act.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[9] 47 U.S.C. §331(c)(3).

Proceeding Termination of
Satellite Direct B/C
Technical Standards

Report and Order adopted terminating proceeding regarding technical standards for the Direct Broadcast Satellite Service. Commission continues to believe industry groups provide appropriate mechanism for study and resolution of technical issues at this stage of development.

— *Direct B/C Satellite Service*
MM Docket No. 85-32

FCC 86-359

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Subpart C of Part 100 of the Commission's Rules and Regulations Regarding Technical Standards for the Direct Broadcast Satellite Service	MM Docket No. 85-32

REPORT AND ORDER

(Proceeding Terminated)

Adopted: August 7, 1986; Released: August 21, 1986

BY THE COMMISSION;

Introduction

1. This action terminates the above-captioned proceeding regarding technical standards for the Direct Broadcast Satellite (DBS) Service. As stated in the *Notice of Proposed Rule Making* (*Notice*) [1] the proceeding was intended to limit interference among DBS systems and to ensure a reasonable degree of interoperability between systems and receivers.

[1] *See Notice of Proposed Rule Making* in MM Docket No. 85-32, FCC 85-61, 50 FR 6971, February 19, 1985 (adopted February 6, 1985.

Background

2. The technical standards proposed in the *Notice* were based on the recommendations of the Advisory Committee on Technical Standards for the DBS Service.[2] The *Notice*, while proposing adoption of the suggested standards, expressed reservations about the need for *any* Commission-mandated technical standards. Therefore, the *Notice* suggested that marketplace forces could foster voluntary industry standards.

3. In this light, the Commission limited the proposed standards to only those related to system interoperability and to prevent interference. These proposed standards were: 1) opposite sense uplink/downlink circular polarization; 2) specified method of energy dispersal; 3) presence of a DC component in the video signal; 4) channel numbering; and 5) local oscillator frequency of 11.2 GHz.[3]

4. Although the comments received in response to the *Notice*[4] generally supported adoption of technical standards for the DBS service, they did not provide a sufficient basis to overcome the reservations expressed in the *Notice*. In fact, the comments served to reinforce the Commission's observations that mandated standards could prove harmful by limiting the ingenuity of DBS operators.

Discussion

5. While the comments generally supported imposition of mandatory standards, nearly all commenters opposed at least one of

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[2] The Advisory Committee was created by the Commission in June 1983 to provide advice on the facts, circumstances, and considerations regarding the standardization of requirements for DBS signal transmission and reception, and to develop and recommend appropriate standards for the Commission to impose. The Committee submitted a *Final Report* summarizing their findings on June 30, 1984. This *Final Report* contained specific recommendations for mandatory technical standards (those which received unanimous or near unanimous support from the Committee's members) and for voluntary standards (those which were not universally supported by the Committee). The mandatory recommendations formed the basis for the technical standards proposed in the *Notice*.

[3] Although the Advisory Committee also recommended that the transmission of a standard video automatic gain control (AGC) reference signal be mandatory, the *Notice* declined to propose such a requirement.

[4] Comments and/or reply comments were submitted by: American Telephone and Telegraph Co. (AT&T); CBS Inc.; Direct Broadcast Satellite Association (DBSA); General Instrument Corporation (GIC); Home Box Office Inc. (HBO); Hughes Communications Galaxy Inc. (Hughes); Institute of Electrical and Electronics Engineers (IEEE); M/A-Com, Inc.; RCA Corporation; and United States Satellite Broadcasting Company Inc. (USSB).

the proposals. For example, comments suggested that there should be some flexibility in the use of varying types of polarization of the uplink transmission. RCA even challenged the proposed assumption that opposite sense polarization categorically simplifies satellite antenna design, a position that the Advisory Committee had determined. The comments of CBS, Hughes, and RCA, all concluded that there is no compelling reason for the Commission to mandate an uplink/downlink polarization scheme as was proposed in the *Notice*. A similar conclusion was reached regarding the proposed channel numbering. DBSA and CBS suggested that the primary reason for this proposal, to eliminate the mechanical wear-and-tear on the antenna polarization selector, is not likely to exist because of the probable use of solid state electronic polarization selectors in the future.

6. The comments regarding energy dispersal were inconclusive as to which method of implementation would be more appropriate. While there was no opposition to the other proposed standards, i.e., video signal DC component, and the 11.2 GHz local oscillator frequency, AT&T did note and oppose the tolerance factor, which was inadvertently stated in the *Notice* as ±0.05 GHz. (The correct figure should have been ±0.5 MHz).

7. With regards to the proposed polarization and energy dispersal proposals, the Commission notes that the Final Acts of the RARC-83 Conference allows some flexibility to counteract problems that might result from a single method of operation. Furthermore, in view of the controversy and contradiction raised in the comments, the Commission now believes that only actual operating experience will prove which of the various technical approaches are the most feasible. In view of this, it is inappropriate to adopt standards in these areas.

8. As stated above, the Advisory Committee also recommended certain voluntary standards. While the *Notice* did not propose to adopt those recommended voluntary standards, it stated that the Commission fully endorsed the industry's approach to set technical standards without government intervention. The *Notice* did present a brief description of the most prominent voluntary recommendations and invited comments on their merits.

9. The majority of the comments regarding the recommended voluntary standards emphasized the selection of a video signal transmission format. DBSA conducted extensive comparison testing of the contending systems. After its analysis, DBSA recommended a "multiplexed analog component" (MAC) type system.

However, other industry participants independently challenged that selection and instead recommended a "National Television System Committee" (NTSC) type system. The MAC type system was tested and compared with the performance of an enhanced NTSC system. The proponents of the MAC type system, DBSA and USSB, suggested that it is better suited for future use in high definition television (HDTV). The proponents of the NTSC system, General Instruments and RCA, cited the ongoing research and development in Japan and the United States with NTSC/HDTV. They argued that the NTSC system has better relative cost and compatibility factors with the current NTSC terrestrial system. M/A-Com also opposed the MAC type system, while HBO opposed both systems, suggesting that no decision be made until further testing and study of the issue.[5]

10. Finally, nearly a decade has passed since the first formulation of DBS concepts and the associated technical parameters. The original technical requirements for this service have undergone almost continual modification to reduce costs and to increase the efficiency and flexibility of the DBS service. For example, the transponder transmitter powers originally proposed, have been reduced to allow an increase in the number of channels that can be broadcast from a satellite. The increased number of channels may allow more effective competition with cable television and with the unexpected growth in the satellite television receive-only systems (TVRO). Also, the larger TVRO antenna dish size (six to ten feet) has altered the industry's perception of what customers will accept for equipment. All of these factors convince us that rigid government regulations would not allow the DBS industry the freedom it needs to develop into a competitive service. Therefore, we decline to adopt the proposed standards.[6]

Conclusions

11. Upon review, the Commission continues to believe that industry groups provide the appropriate mechanism for study and

[5] The Advanced Television Systems Committee (ATSC) is also considering voluntary national standards for television video and signal formats.

[6] It should also be noted that only three of the eight and one of the next six permittees have shown due diligence in the construction of their facilities. The other original permittees have left the field for a variety of reasons and their permits have been cancelled. (One has reapplied.) Three from the second group have also "withdrawn," with two of those stating an intention to reapply at a later date. The other two permittees, and a third group of three more permittees, hold conditional construction permits, but have not shown due diligence in construction.

resolution of technical issues at this stage of development.

12. Regulatory Flexibility Final Analysis

I. Need and purpose of this action:

This proceeding was meant to encourage development of the DBS service by reducing the possibility of interference and providing compatibility among DBS systems.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

Although the *Notice* proposed adoption of certain standards for DBS service, it did so with some reluctance. The Commission proffered that industry standards would likely be more appropriate than mandatory standards, because regulations could hinder, rather than stimulate, development of the DBS service. The comments in this proceeding, although generally supportive of the proposed standards, also reflected this belief. The Commission therefore declines to adopt the proposed standards.

III. Significant alternatives considered and rejected:

None.

13. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of Small Business Administration, in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq),* (1981).

Paperwork Reduction Act

14. The *Report and Order* contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed and the public.

Ordering Clauses

15. Accordingly, IT IS ORDERED, that this proceeding IS TERMINATED.

16. For further information on this proceeding, contact Bernard Gorden at (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Ex Parte, Communications by Applicants and Privies
Rule Making, Notice of Proposed

Notice of Proposed Rule Making adopted regarding comprehensive revision of Subpart H, Part 1, of Commission's rules and regulations concerning ex parte communications and presentations in Commission proceeding. A major objective of this proceeding is to develop rules that are easier to understand and apply. In addition, proposed revisions are expected to remedy problems experienced under the current rules.
—*Ex Parte Communications*
Gen. Docket No. 86-225

FCC 86-284

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings	Gen. Docket No. 86-225

NOTICE OF PROPOSED RULE MAKING

Adopted: June 5, 1986; Released: July 9, 1986

BY THE COMMISSION:

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I. INTRODUCTION

1. By this notice, we propose to undertake a comprehensive revision of the ex parte rules appearing in Subpart H, Part 1 of the Commission's Rules and Regulations, 47 CFR §§ 1.1201-1.1251.

2. A fundamental purpose of the ex parte rules is to ensure that all participants in agency proceedings are afforded a fair opportunity to present information and evidence in support of their positions. This assures participants and the general public that agency decisions are based upon a "public" record developed in the proceeding rather than upon communications that are shrouded in secrecy. In addition, it ensures that a reviewing court has before it a complete record of agency proceedings so as to enable effective judicial review of the agency's action. *See* 5 U.S.C. § 706.

3. An equally important objective is to establish procedures that allow the Commission sufficient flexibility to obtain information and evidence necessary for reasoned decision making. Thus, the ex parte rules not only set forth guidelines that are intended to comport with elementary principles of "fairness" and "due process," but they are also designed to facilitate a full exchange of information so that informed and reasoned agency decision making may result.

4. In substantial measure, we believe the existing rules achieve these ends. However, the rules are complex and difficult to understand, especially for those not well acquainted with Commission practice and procedure. Therefore, a major objective of this proceeding is to develop rules that are easier to understand and apply. In addition, we are proposing revisions to remedy a number of problems we have experienced under the current rules. In pursuit of these goals, we have set forth as an appendix to this document proposed new ex parte rules upon which we invite comment—from trade organizations, bar associations, and all other interested members of the public. We believe that the public's participation in this proceeding will provide considerable assistance in our endeavor to simplify and clarify the existing rules. We particularly invite commenters to bring to our attention any unidentified, and hence unintended, substantive changes that might stem from the revisions we have proposed.

A. Background

5. The first comprehensive set of ex parte rules was established by the Commission in 1965. The rules generally prohibited the making of ex parte communications directed to the merits or outcome of "adjudicative proceedings and . . . those rulemaking proceedings required by statute to be decided on the record after opportunity for hearing."[1] The Commission had previously relied on generally established principles of law and on Section 409(c) of the Communications Act of 1934, as amended,[2] as safeguards against improper ex parte presentations in its proceedings. Adoption of the 1965 rules was spurred by a final report of the Administrative Conference of the United States, which recommended that each federal agency promulgate a code of behavior governing ex parte communications.[3] The Commission on several occasions has modified the original rules,[4] but the most comprehensive changes were made in 1980 when the Commission adopted rules governing ex parte presentations in informal rule making proceedings.[5] These later changes were made to dispel uncertainty that had been created by sharply divergent views expressed by different panels of the United State Circuit Court of Appeals for

[1] *See Report and Order in Docket No. 15381*, 1 FCC 2d 49, 51 (1965).

[2] Section 409(c)(1), which now governs ex parte communications, reads as follows:

> In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for a hearing, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 5(d)(1), unless upon notice and opportunity for all parties to participate.

[3] *Final Report of the Administrative Conference of the United States*, December 15, 1962 (recommendation 16).

[4] *See, e.g.*, 34 Fed. Reg. 8242 (May 28, 1969); 36 Fed. Reg. 19440 (Oct. 6, 1971); 37 Fed. Reg. 19372 (Sept. 20, 1972); 39 Fed. Reg. 18280 (May 24, 1974); 40 Fed. Reg. 21958 (May 20, 1975); 40 Fed. Reg. 47136 (Oct. 8, 1975); 42 Fed. Reg. 12869 (Mar. 7, 1977); 43 Fed. Reg. 29561 (July 10, 1978); 44 Fed. Reg. 39181 (July 5, 1979).

[5] *See Report and Order in Gen. Docket No. 78-167 ("1980 Report and Order")*, 78 FCC 2d 1384 (1980), *recon. denied Memorandum Opinion and Order*, 93 FCC 2d 1250 (1983). The only ex parte restrictions previously applied to informal rule making proceedings were those required in proceedings involving "resolution of conflicting private claims to a valuable privilege" pursuant to the court decision in *Sangamon Valley Television Corporation v. United States*, 269 F. 2d 221, 224 (D.C. Cir. 1959). The Commission also had adopted interim measures and procedures for informal rule making proceedings pending the final resolution of issues in Gen. Docket No. 78-167. *Order, Notice of Inquiry, and Interim Policy Statement in Gen. Docket No. 78-167*, 68 FCC 2d 804 (1978).

the District of Columbia. In *Home Box Office, Inc. v. FCC* 567 F. 2d 9 (D.C. Cir. 1976), *cert. denied* 434 U.S. 829 (1977), one panel held that ex parte communications should be barred in all informal rule makings once a notice of proposed rule making had been issued. In *Action for Children's Television v. FCC*, 564 F. 2d 458 (D.C. Cir. 1977), *rehearing denied* 564 F. 2d 458 (1977), a different panel decided that ex parte contacts need be restricted only in *Sangamon*-type proceedings involving "competing claims to a valuable privilege." Thus, the current rules governing ex parte communications are in large measure the produce of the *1965 Report and Order*, which dealt with ex parte communications in "on the record" proceedings, and the *1980 Report and Order*, which addresses ex parte communications in informal rule making proceedings.

B. Reasons for Initiating Rule Making and Summary of Major Actions Proposed

6. As indicated above, approximately twenty years have elapsed since the agency's adoption of a comprehensive set of ex parte rules. Although we have made piecemeal revisions to these rules throughout the years, with the exception of the major provisions governing informal rule making proceedings, we have not undertaken a wholesale review of the rules. Moreover, we note that it has been almost ten years since Congress enacted the *Government in the Sunshine Act*, P.L. 94-409, 90 Stat. 1241 *et seq.* (1976), amending the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §551 *et seq.*, to provide, *inter alia*, statutory prohibitions against ex parte communications in "on the record" agency proceedings, and since the rules were amended to incorporate these statutory changes. Although the existing rules appear to satisfy the APA requirements and therefore meet the congressional objectives underlying them, we believe the rules can be improved to operate in better tandem with the statutory provisions. *See, e.g.*, paras. 10 and 22, *infra*. Secondly, as more fully discussed below, there are a number of areas in which the rules appear to be inconsistent with existing agency practice or are silent as to the proper ex parte procedures that should apply in particular instances. It is therefore important that the rules be revised to eliminate any preceived disparity between the existing rules and agency practice and to dispel uncertainty that stems from the rules' failure to address recurring situations arising before the agency. Finally, as noted at the outset, we believe that the present rules may be needlessly complex and difficult to

understand.[6] Therefore, at a minimum, the rules should be simplified to assure that all parties understand the constraints that apply to their communications with agency decision-makers.

7. For the foregoing reasons, we are taking a new look at the rules. Besides recasting the existing provisions in a simpler format (see attached appendix), the major changes we propose are as follows:

—to make clear that the ex parte prohibitions apply to presentations both *to* and *from* decision-making personnel in restricted proceedings (para. 10, *infra*);

—to exempt status inquiries, *whether solicited or not*, from the ex parte prohibitions (paras. 12–14, *infra*);

—to redefine decision-making personnel for purposes of *both* non-restricted and restricted proceedings to include any agency person "who is or may reasonably be expected to be involved" in the decision-making process in the proceeding (paras. 22–24, *infra*);

—to clarify that only "formal oppositions" as defined herein, not informal oppositions or objections will trigger the application of the more stringent ex parte constraints (para. 26, *infra*);

—to clarify that tariff proceedings are exempt from ex parte requirements unless they have been set for investigation or designated for hearing (paras. 33–34, *infra*), and that, after designation, "permit but disclose" procedures generally apply;

—to clarify that the less restrictive "permit but disclose" ex parte procedures that now apply to informal rule making proceedings also apply to any proceeding instituted by a notice of inquiry which could lead to a change in policy intended to be binding as a matter of law (para. 38 *infra*);

—to clarify that any presentations, *whether ex parte or not*, are prohibited in non-restricted proceedings from the time that any such proceeding is placed on the Sunshine Agenda for Commission consideration, (paras. 43, *infra*);

—to apply ex parte restraints to most "contested" adjudicative proceedings (para. 51, *infra.*)

—to provide that the Managing Director shall provide notice to parties to a proceeding when a prohibited ex parte presentation has occurred but shall *not* be required to serve copies of the prohibited presentation except

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[6] For example, not so long ago in *Memorandum Opinion and Order in Gen. Docket 78-167, supra*, at 1258–1259, former Commissioner Rivera, in a concurring statement, indicated that even the newly-adopted rules applicable to informal rule making proceedings are "too often, little more than traps for the unwary" and that "there is substantial confusion about the scope and applicability of the rules, even among the Commission's own staff."

if he determines that there are public interest reasons which warrant disclosure of such information (para. 54, *infra*).

Our reasons for the substantive changes suggested above are discussed in the following paragraphs. We must emphasize, however, that the proposed rules are intended to elicit comment and discussion; they by no means preclude the submission of alternative proposals for dealing with ex parte communications in agency proceedings. We now turn to a section-by-section explanation of our proposals.

II. GENERAL PURPOSES OF RULES

8. *Section 1.1200 Purpose.* We have explained above that a major purpose of the ex parte provisions is to ensure that our decisional processes are fair, impartial, and otherwise comport with the concept of due process. This important purpose underlying the rules cannot be overemphasized and, for this reason, we propose to include in the new rules a statement of purpose to that effect. We also believe it is important to recognize that the standards established by the rules are procedural *minima*, and, accordingly, we are including a statement to that effect. We have also provided at the outset of the proposed rules a brief general description of the operation and applicability of the ex parte rules to the different categories of Commission proceedings. Finally, we believe that persons outside the Commission should be aware that the staff of the Office of General Counsel is available to address questions by persons outside the agency who may be doubtful as to the propriety of a communication. Accordingly, we have proposed a note to this section which makes clear that any inquiries regarding the ex parte rules should be channeled to the Office of General Counsel.

III. DEFINITIONS

9. *Section 1.1202 Definitions.* A major objective underlying our revision of the definition section of the rules is to define the key terms used in the ex parte rules more clearly than does the present Section 1.1201. Another objective is to ensure that our definitions comport with the APA's provisions regarding ex parte communications. Accomplishment of these objectives results in a number of substantive changes in the scope or effect of the present ex parte definitions.

A. Ex Parte Presentation

10. Initially, we propose to expand the definition of the term "ex parte presentation". The present definition in Section 1.1201(g) of the Rules now reaches only presentations made *to* decision-making personnel. However, Section 557(d)(1)(B) of the Administrative Procedure Act, 5 U.S.C. §557(d)(1)(B), specifically provides that, in "on the record" rulemaking and adjudicatory proceedings, ex parte presentations *by* decision-making personnel are also improper.[7] We propose therefore to conform our definition of the term "ex parte presentation" to the provisions of the Administrative Procedure Act so that the term includes presentations both *by* and *to* decision-making personnel in restricted proceedings.[8]

1. Status Inquiries

11. Our proposed new definition is also intended to clarify the meaning of status inquiry. Section 1.1227 of the existing rules already excepts status inquiries from ex parte constraints and, therefore, our proposal here would not constitute a substantive change to the rules. By status inquiry, we mean a request for information solely related to the status of a proceeding and which generally is limited to whether the matter is pending or not, when the matter is likely to be decided, whether the pleading cycle has been completed, or whether any new pleadings or information has been submitted. However, the making of statements which reflect "why" an action is important to a party at a particular time (e.g., party asserting the Commission should act within a specified period of time) are not permissible since timing may be an important substantive issue in the proceeding. Consequently, such statements would be prohibited.

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[7] The definition of ex parte presentation for purposes of a non-restricted proceeding would be limited to presentations made *to* decision-making personnel. Thus, no substantive change would be effectuated under the proposed rules in the status of speeches, panel presentations, or other presentations given by Commissioners or other decision-making personnel concerning policy matters at issue in non-restricted rule making proceedings. *See* Section 1.1202(b) These activities are an appropriate and legitimate aspect of the policy making function and we contemplate no changes here.

[8] This proposal will also conform the definition to Section 1.1225(b) of the existing Rules to the extent that that section was designed to prohibit decision-making personnel from *making* or causing to be made ex parte presentations.

2. Solicitations of Status Inquiries by Others

12. At present, Section 1.1227 of the Rules contains a proviso prohibiting interested persons from soliciting ex parte status inquiries by others. However, the existing rules do not expressly say whether a status inquiry which arises from a prohibited solicitation is prohibited because it was solicited. As explained below, we propose under the new definition that status inquiries be exempted even if they are solicited and that such solicitations not be prohibited.

13. We already have a long recognized exception for "solicited" congressional inquiries that are directed solely at administrative delay in the proceeding. *Fine Music, Inc.*, 8 FCC 2d 529 (1967). In *Amigos Broadcasting, Inc. v. FCC*, 696 F. 2d 128 (D.C. Cir. 1982), the court of appeals recognized this exception and acknowledged that such congressional inquiries are not likely to stop.[9] In our view, as long as the inquiry is not directed to the merits or outcome of the proceeding and is limited to the status of a proceeding, there is no need to treat it as an ex parte presentation for purposes of our rules. The issue is not whether a status inquiry is solicited or whether it is related to "administrative delay" (if forwarded by a member of Congress) but, more importantly, whether the communication is directed to the merits or outcome of a proceeding.[10]

14. Moreover, we note that the legislative history of the Government in the Sunshine Act reveals a congressional intent to exclude "procedural inquiries, such as requests for status reports" from statutorily imposed ex parte prohibitions. Indeed, the House Report specifically mentions that the new statutory provisions "are not intended to prohibit routine inquiries or referrals of constituent correspondence."[11] In any event, we believe that decision-making personnel are quite capable of deciding which communications constitute mere status inquiries and which are

[9] That court was also concerned with the disparity in treatment between the Commission's handling of written ex parte communications and that of oral ex parte communications. Because we are of the opinion that mere status inquiries, whether written or oral, should not be treated as "ex parte presentations," we are proposing rules which reflect this view. Moreover, this proposal would appear to dispense with the concern expressed in *Amigos* over differing treatment accorded to oral and written communications.

[10] This approach would also reduce the staff paperwork burdens associated with ensuring that copies of all written communications are placed in the public file of the proceeding. Additionally, it would obviate the need suggested by the court in *Amigos* of a system for memorializing oral communications in the same fashion as written ones.

[11] *See H.R. Rep. No. 880 (Part I)*, 94th Cong., 2d Sess. 20–22 (1976).

directed to the merits or outcome of a proceeding, especially since they are already required to make similar judgments in many other contexts relating to the ex parte rules.

15. We recognize, however, that Congress was fully aware that a request for a status report could rise to the level of an impermissible ex parte contact.[12] Aware of this possibility also, we propose to include a note following the definition of ex parte presentation to advise persons that status inquiries made with the intention of stating a preference for a party or a position in a particular proceeding, or otherwise affecting the merits or outcome, are improper. Similarly, solicitating others to make such presentations is prohibited.

3. Casual or Incidental Remarks

16. We also propose to exclude from the definition of ex parte presentation those types of communications consisting of incidental, inadvertent remarks that often occur in social settings, and which usually are made by persons unaware of Commission practice and procedure. In general, these communications should not be considered communications meant, or likely to influence, the outcome of a proceeding and, for this reason, we doubt whether communications of this nature should be considered ex parte contacts. Because the legislative history accompanying the 1976 APA amendments specifically provides that the new ex parte prohibitions were not meant to cover the making of a "casual or general expression of opinion about a pending proceeding" made by a member of the public at large, it appears that Congress intended to exclude communications of this nature from the category of "ex parte communication relevant to the merits of the proceeding" under Section 557(d)(1) of the Administrative Procedure Act.[13] Accordingly, we include language in our definition of "ex parte presentation" that has the effect of removing such communications from the application of our ex parte rules.

17. We emphasize, however, that this exclusion is not intended to exempt from the ex parte rules all communications that take place outside normal business or agency-related channels. Of course, casual or incidental remarks by parties to a proceeding are barred. But, in addition, if presentations are made by other persons who have a direct or clearly identifiable interest in the proceeding or who, because of background or expertise in the

[12] *See Id.* at 20–21.
[13] *See id.* at 19 (1976).

subject matter, are likely to have an influence on decision makers, such presentations properly are subject to the rules' prohibitions.

4. Interested Person

18. We also propose to omit the definition of "interested person" now found in Section 1.1201(e) because, in our judgment, it may unduly limit the class of persons who should be barred from making ex parte presentations. For example, even though a person may not have a direct or clearly identifiable interest in a proceeding, that person might nevertheless be viewed by others as having considerable influence upon decision-makers because of his or her special background or expertise in the subject matter. Yet, under the existing definition of "interested person," it is unclear whether such a person would be subject to ex parte restraints. In other respects, use of the term "interested person" may unnecessarily complicate the rules without offering any substantial countervailing benefit. We note, for example, that under the existing rules, the making of an ex parte presentation in a restricted adjudicatory proceeding that has not been designated for hearing is prohibited by interested persons but *not* by others. Once a restricted proceeding has been designated for hearing, however, the existing rules prohibit any person whether "interested" or not from making an oral ex parte presentation. In addition, the rules prohibit only "interested persons" from making written ex parte presentations. We perceive no significant benefit to be gained by retaining the present distinctions in treatment between interested persons and others. On the other hand, elimination of these subtle distinctions in the existing rules may reduce confusion and provide simplicity in the application of the rules.

19. We believe that elimination of the existing definition of interested person would also be appropriate in non-restricted informal rule making proceedings. In denying reconsideration of our *1980 Report and Order* pertaining to non-restricted proceedings, we declined to extend the rules to persons other than "interested parties" on the ground that the present definition of "interested person" is "sufficiently broad to encompass all persons outside the Commission, who would likely be involved in *ex parte* contacts."[14] On reflection, however, we think that the

[14] *Memorandum Opinion and Order (Reconsideration), Gen. Docket No. 78-167, supra*, at 1257. The present Section 1.1201(e) of the Rules includes within the definition of "interested person" any person "with a direct or indirect interest in the outcome of a restricted or a non-restricted rule making proceeding."

difficulties in distinguishing between "interested persons" and others for purposes of applying, administering, and enforcing the rules justify our proposal to eliminate this distinction. In addition, we previously were concerned that applying the ex parte rules to all persons in informal rule making proceedings "would effectively frustrate even the most casual conversation with members of the public."[15] However, as indicated above, by carving out an exception for casual or incidental remarks, we believe that the concerns previously expressed can be adequately allayed. In any event, we invite comment on whether any adverse consequences, administratively or otherwise, might occur, if we were to extend the ex parte restrictions to all persons.

5. Presentations Prohibited in a Restricted Proceeding May Be Permissible in Non-restricted Proceedings

20. Although we are proposing some changes to our definition of "ex parte presentation," we wish to make clear that, as under the existing definition, the term "presentation" is not meant to bar "communications, such as comments, submitted openly in the proceeding or in other proceedings. Nor do the rules bar communications regarding 'general industry problems,' so long as these do not deal with the merits of the restricted proceeding." *See 1978 Report and Order, supra*, at 1397 n. 21 and also *1965 Report and Order, supra*, at 56-58.[16] In sum, the rules are not intended to prevent persons in restricted proceedings from "pursu[ing] other legitimate interests before the Commission," provided they do "not use the pendency of other matters as a pretext for ex parte communications going to the merits or outcome of a restricted proceeding." *Id.* at 58. Nor do the rules preclude Commission discussions or consultations with other agencies or branches of government on general policy questions in other proceedings or forums. Thus, where a communication is permissible in a pending non-restricted rule-making proceeding and is not directed to the

[15] *Id.* at 1257.

[16] *See also H.R. Rep. No. 880 (Part I), supra*, at 20:

> The subsection prohibits an ex parte communication only when it is "relative to the merits of the proceeding." ... It excludes general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rule making involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not discuss the specific merits of a pending adjudication it is not prohibited by this section.

merits or outcome of an ongoing restricted proceeding, it need not be served on the other parties to the restricted proceeding. The communication would, of course, be subject to the ex parte provisions applicable to non-restricted proceedings; *e.g.*, the "permit but disclose" procedures.

6. Presentation Includes Any Issue Going to Merits

21. Finally, we wish to point out that the term "ex parte presentation" is intended to reach *any* issue going to the merits of a proceeding. Thus, it includes procedural as well as substantive issues. Neither the existing definition nor the one proposed herein makes a distinction between the two. In the *1965 Report and Order*, adopting the rules, the Commission stated:

> The definition includes . . . communications going to the merits of any substantive or procedural question which is in dispute in the proceeding; and communications containing facts or allegations concerning the parties to the proceeding or matters which may affect the outcome therein, even though these matters may not have been placed formally in issue or considered on the record.

1 FCC 2d at 56. We propose to continue this ex parte prohibition even to matters not directly in dispute, but we invite comment upon it. We also note that, in the *Report and Order*, at 56–57, the Commission made clear that a person is not prohibited "from seeking advice from appropriate Commission personnel concerning compliance with procedural requirements, provided the area of inquiry is not in fact an area of controversy in the proceeding."[17] We invite comment on whether any restrictions should be placed on such inquiries.

B. Decision-Making Personnel

22. We also propose to delete the current definitions of "decision-making personnel" now found in rule Sections 1.1205, 1.1209, and 1.1213. The existing rules set forth different categories of decision-makers for restricted adjudicatory, restricted rule making and non-restricted rule making proceedings. Instead, we propose a uniform definition of the term "decision maker" that will apply to all of these proceedings. This change would render

[17] Our previous and present treatment of this area appears consistent with the congressional intent reflected in *H.R. Rep. No. 880, supra*, at 20, which excludes "procedural inquiries, such as requests for status reports, which will not have an effect on the way the case is decided." But, as indicated earlier, statements reflecting "why" an action is important to a particular party at a particular time would be treated as a presentation, not a status request.

our rules more consistent with the ex parte provisions in the Administrative Procedure Act, which apply to "any member of the body comprising the agency, administrative law judge, or other employee *who is or may reasonably be expected to be involved in the decisional process of the proceeding*" 5 U.S.C. § 557(d)(1)(B) (emphasis added). Similarly, we believe our rules should uniformly define "decision-making personnel" as any employee who is involved or may reasonably be expected to be involved, in the decision-making process. In this regard, we also note that Section 1.1213 of the current rules provides that for non-restricted rule making proceedings "decision-making personnel" includes any person who is "professionally" involved in the proceeding. In *Report and Order in General Docket 78-167, supra*, at 1398, we explained that professional employees are "lawyers, engineers, economists, accountants and any other staff members having substantive input into a proceeding." Our proposed definition, however, would go beyond this by including any member, officer or employee who is or may reasonably be expected to be involved in the decisional process in a proceeding. It would specifically take into account that, in a particular proceeding, some professional Commission personnel may not be involved in the decisional process (e.g., a separated trial staff) while some non-professional personnel may be so involved (e.g., a Commissioner's confidential assistant).

23. Another major effect of this proposed change would be that the term "decision-making personnel" would include some agency officers and employees who act in a decision-making capacity but who are not now included within the scope of any of the existing provisions. To illustrate, the Chief, Mass Media Bureau, not only makes recommendations about but is authorized to grant applications for authorizations in the radio and television services.[18] In performing these duties, the Bureau Chief clearly acts in a decision-making role. Despite that, the Chief, as well as other members of his staff who often have critical involvement in the decisions to grant or deny radio or television applications, is not a "decision-making person" under the section of the rules applicable to restricted adjudicative proceedings which have not been designated for hearing.[19] We believe that these personnel should

[18] *See e.g.*, Section 0.61 of the Commission's Rules and Regulations, describing the functions of the Mass Media Bureau, and Section 0.283 of the Rules and Regulations, describing the authority delegated by the Commission to the Chief, Mass Media Bureau.

[19] After designation, of course, the Mass Media Bureau is not a decision-maker but is a party to the proceeding.

be treated as decision-making personnel when they act in that capacity and should be subject to the same ex parte provisions that apply to other decision-making personnel in restricted proceedings. Indeed, as a practical matter, many Bureau personnel already follow this policy and do not entertain ex parte presentations.

24. We recognize that in the *1965 Report and Order, supra*, at 54 n. 5, the Commission declined to impose "restrictions upon communications between interested persons and the processing staff" based upon "experience and application processing requirements." Under our proposal here, the ex parte rules would apply to those staff members who are or may reasonably be involved in the decisional process in an adjudicative proceeding. We are aware of the possibility that such a requirement could impose considerable constraints upon agency staff in the processing of applications and in attempting to reach settlement agreements between the parties, particularly, in formal complaint proceedings involving common carriers. Accordingly, we have proposed that in adjudicative proceedings that have *not* been designated for hearing the staff may make information requests ex parte on the condition that any new information obtained be subject to the "permit but disclose" requirement now applied to informal rule making proceedings. If parties to the proceeding are apprised of any new information obtained through staff requests and are afforded an opportunity to challenge such information, then the underlying protection sought to be provided by the ex parte rules would appear to be preserved. *Cf. Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC* 595 F.2d 621, 630-632 (D.C. Cir. 1978). We believe that this can best be accomplished by carving out an exemption from the ex parte constraints for presentations requested by Commission staff for the clarification or adduction of evidence or for the resolution of issues in a proceeding which has not been designated for hearing. *See* Section 1.1204(b)(5). We would require, however, any new written information and a summary of any new oral information elicited from such a communication be served on the other parties to the proceeding. We believe that such an approach would be conducive "to the proper dispatch of business and to the ends of justice" under Section 4(j) of the Act and, accordingly, invite comment on it.[20]

[20] In informal rule making proceedings, we would treat staff information requests in the same manner. Except during cutoff periods, bureau and office staffs would be permitted to request information or clarification from persons outside the Commission without disclosing the contact. However, any written response,

C. Adjudicative Proceeding

25. We have also included in the definition section the term "adjudicative proceeding." This term is new and is defined as "a proceeding, other than a rule making or a tariff proceeding involving future rates of practices, initiated upon the Commission's own motion or upon the filing of an application, petition for special relief or waiver, formal complaint, or similar pleading that involves an authorization or action pertaining to specific entities or persons."

D. Formal Opposition

26. Our previous experience reveals that the disparity in treatment between formal and informal oppositions has been a source of considerable confusion and uncertainty. We have previously held that a proceeding does not automatically become restricted upon the filing of informal objections or comments, as opposed to pleadings that satisfy the formal requirements of a petition to deny or similar opposition. *See, e.g., Channel 41, Inc.*, 24 FCC 2d 603 (1970). To alleviate recurring problems in this area, we propose to add a new term "formal opposition" which is defined as "a pleading which opposes the grant of a particular application, waiver request, special relief petition, or similar request for Commission action and which makes unmistakably clear from its caption and text that it is intended to be a formal opposition (e.g., not a mere "comment"), is served upon the other parties to the proceeding and is timely filed." The purpose of this rule change is to make clear that oppositions or objections which do not meet the criteria of a "formal opposition" will not trigger application or ex parte requirements *vis-a-vis* the formal party and the Commission. *See also* para. 29, *infra*, and "Note" to Section 1.1204(a)(1) of the proposed rules.[21]

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or oral response that provides new information, would be placed in the public file. *See 1980 Report and Order, supra*, at paras. 56–57. We request comment on whether any changes should be made in this policy, e.g., whether staff members during the Sunshine period should be permitted to request clarification of data submitted by the parties.

[21] Because the rule making we are instituting today is much broader and will result in the filing of more up-to-date comments on this issue, we are issuing a separate order terminating the *Notice of Proposed Rule Making in Gen. Docket 79-249 (In the Matter of Amendment of the Rules Governing Ex Parte Communications)*, FCC 79-587 (1979), which had proposed adoption of similar criteria to clarify the difference in treatment between formal and informal oppositions under the ex parte rules. It should be noted that our proposal to classify certain pleadings as formal oppositions for ex parte purposes is not intended to determine a pleading's status as a "petition to deny" under section 309 of the Act.

E. Sunshine Agenda Period

27. We also intend to clarify our current rules by providing that the Sunshine prohibition (*see* paras. 43–44, *infra*), extends from the time the matter is placed on the Sunshine Agenda until either (1) the matter is acted upon by the Commission and a final order has been released reflecting the agency's action; or (2) issuance of a public notice stating that the matter has been deleted from the Sunshine Agenda prior to the scheduled Commission meeting; or (3) issuance of a public notice stating that the matter has been returned to the staff for further consideration. To this effect, we are including a definition of "Sunshine Agenda period" in subsection (f). In the past, questions have arisen over the applicability of the ex parte rules in circumstances where a matter originally scheduled for Commission consideration is deleted from the Sunshine Agenda. In addition, it is sometimes unclear whether discussion of a matter at a Commission meeting resulted in the matter being returned to the staff for further consideration, as opposed to being adopted subject to staff revisions requested by the Commissioners. Accordingly, the new definition makes clear that the absolute prohibitions would be removed in favor of the less restrictive "permit but disclose" requirements only upon issuance of a public notice that either the matter has been deleted from the Sunshine Agenda or the matter has been returned to the staff for further consideration. Obviously, if we ultimately conclude against retention of the Sunshine period prohibition, *see* para. 45, the changes proposed above would be unnecessary.

IV. GENERAL EXEMPTIONS

A. Proceedings In Which No Ex Parte Restrictions Apply.

28. Section 1.1204. We are proposing a new section which indicates the types of proceedings or types of communications not subject to any ex parte restraints or disclosure requirements. A major benefit we perceive from this restructuring is that, unlike the former rules, this section clearly delineates proceedings in which no ex parte restraints apply.

1. Informal Adjudications

29. Set forth in subsection (a) are the types of proceedings we believe should not be subject to *any* ex parte prohibitions or

constraints. In general, this category includes any proceeding which is not formally opposed, does not involve a mutually exclusive application, and which has not been designated for hearing. The need for ex parte constraints to ensure procedural fairness to parties appears to be absent in these proceedings since communications between the party involved and Commission personnel do not affect the rights of other persons. Of course, it would be still impermissible for a person who is not a party to make ex parte presentations to decision-makers concerning the proceeding. *See* "Note" to Section 1.1204(a)(1). The rules also include a cross-reference to Section 1.1208(b) to make clear that parties who intend to file an opposition or mutually exclusive application should not communicate ex parte.

2. Inquiry Proceedings

30. Also included in this category would be any "inquiry" proceeding other than one in which the Commission states that it contemplates the adoption of a binding policy determination. Because inquiry proceedings are primarily designed for preliminary fact-gathering and are not intended as final vehicles for regulatory change, application of ex parte constraints would hinder unnecessarily Commission efforts to obtain information from the public. However, sometimes we institute a proceeding by issuing both a notice of inquiry *and* notice of proposed rule making. In those instances, the ex parte procedures applicable to rule makings will govern the proceeding. *See, e.g., Notice of Inquiry and Notice of Proposed Rule Making in MM Docket No. 85-349* 50 F.R. 48232 (November 22, 1985), relating to cable system carriage of local television signals.

3. Petitions for Rule Making and Unopposed Freedom of Information Act Requests

31. In addition, we propose to continue our existing policy of exempting rule making petitions from all ex parte restrictions. In general, such petitions do not involve the possibility of immediate rule changes. We recognize, however, that a petition for rule making proceeding may involve a *Sangamon*-type matter. For this reason, we invite comment on our proposal to subject rule making petitions which are opposed and involve *Sangamon*-type issues to ex parte restrictions. In addition, requests for information filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, are not now subject to ex parte restrictions. We propose to continue this policy but invite comment on our proposal to apply

"permit but disclose" rules to FOIA proceedings in which an opposition or objection to the request has been filed.

4. Informal Complaint Proceedings under Section 208 of the Communications Act

32. We also propose to include in this category any informal complaint proceeding under Section 208 of the Act and Section 1.716 of our rules against a common carrier, unless it has been designated for hearing. There appears to be no sound reason to subject informal complaint proceedings to ex parte strictures that may hinder Commission efforts to achieve settlements, particularly where unresolved complaints may still be pursued through the formal complaint process.

5. Tariff Proceedings under Section 203, 204, or 205 of the Act Which Are Not Set for Investigation or Designated for Hearing

33. Similarly, we would continue to exempt common carrier tariff proceedings under Sections 203, 204, or 205 of the Communications Act from ex parte restrictions unless they have been set for investigation or designated for hearing. We are reluctant to apply ex parte constraints in such proceedings even though a petition to suspend or reject may have been filed against a tariff. Imposition of ex parte constraints prior to a Commission action setting the matter for investigation or designating it for hearing would needlessly interfere with processing and staff resolution of such matters.

34. We note that application of ex parte restraints to tariff proceedings that have not been set for investigation or designated for hearing is not legally required. Such proceedings are not viewed under the Administrative Procedure Act as "adjudicatory" in nature and are not subject to the statutory ex parte provisions applicable to formal rulemakings required to be "on the record" under that Act. In addition, Congress has designed a special statutory scheme for tariff, as opposed to other types of, proceedings. *American Telephone and Telegraph Co. v. FCC*, 487 F. 2d 864, 872-873 (2d Cir. 1973).[22] Congress has provided a relatively short period of time for the Commission to decide whether to suspend or reject common carrier initiated tariffs and

[22] "Sections 203 through 205 of the [Communications Act] . . . establish procedures and limitations concerning the Commission's processing of carrier initiated rate revisions" and "that this type of statutory scheme 'represents a careful accomodation of the various interests involved.'" (citation omitted). 487 F. 2d at 873.

apparently did so out of concern that agency delayed action could result in "irreparable damage" to a carrier. *Id.* at 873. Imposing ex parte constraints would impair the Commission's ability to expeditiously review carrier initiated tariffs as required under these statutory provisions.[23] Moreover, Congress has afforded the public another mechanism to redress grievances against common carrier initiated tariffs that have not been suspended or rejected within the statutory prescribed deadlines and have gone into effect — the complaint process under Section 208 — a remedy designed to ensure that such tariffs are not unjust, unreasonable or otherwise unlawful. This process provides ample safeguards to ensure procedural fairness to the parties involved.[24] For these reasons, we do not believe that any statutory provisions or constitutional requirements of due process compel application of ex parte restraints to initial filing stages of tariff proceedings regardless of whether such filings are the subject of petitions to suspend or reject.

B. Exempt Ex Parte Presentations

35. Subsection (b) spells out what ex parte presentations are permissible regardless of the context or the type of proceeding in which they may arise. For the most part, it incorporates the exceptions that are now found in Section 1.1227 of the existing rules but makes several substantive changes. For example, Section 1.1204(b)(1) of our proposed rules, which exempts presentations authorized by statute or by the Commission's Rules, merely reiterates the exemption now found in Section 1.1227(a). That particular exemption merely indicates that the ex parte rules are not intended to override or supersede other provisions of our rules which specifically address the filing of amendments, other pleadings or motions. Thus, the filing and service requirements

[23] We note that acceptance of a rate filing under statutes similar to the common carrier provisions of the Communications Act has been held to be "undeniably interlocutory" and "decides nothing concerning the merits of the case," but rather the "[a]cceptance of a filing, coupled with scheduling of a hearing, is the *initiation* of an administrative proceeding" (emphasis in original). *Papago Tribal Utilities Authority v. Federal Energy Commission*, 628 F. 2d 235, 240 (D.C. Cir. 1980). The underlying rationale of this case — that a rate filing allowed to go into effect without action is an interlocutory decision not generally subject to judicial review — also appears to point out the wisdom of not applying ex parte rules to tariff proceedings prior to their being set for investigation or hearing.

[24] In addition, as the court in *Papago* pointed out, Congress has devised "suspension and refund provisions" to protect customers "from the interlocutory consequences of an unjust or unreasonable rate increase." 628 F. 2d at 241.

applicable to minor amendments to radio applications in the Private Radio Service are not intended to be supplemented by our ex parte rules.

36. We do propose, however, to delete the exception now contained in Section 1.1227(b) for communications initiated by staff of the Common Carrier Bureau and the Cable Television (now Mass Media) Bureau for the adduction of record evidence in restricted rule making proceedings and replace it with the exemption discussed in para. 24, *supra*, for presentations requested by Commission staff for the clarification or adduction of evidence or resolution of issues in the proceeding. In addition, we propose to make clear that, when exempted, requests made by Commission personnel for these purposes do not themselves constitute ex parte presentations under the rules. Other substantive changes upon which we invite comment relates to proposals to include an exemption for communications "which directly relate to an emergency in which safety of life is endangered or substantial loss of property is involved" and an exemption for presentations involving military or foreign affairs functions.

V. NON-RESTRICTED PROCEEDINGS

A. Categories of Non-Restricted Proceedings

27. In Section 1.1206, we spell out the proceedings which, in our opinion, should be subject only to the "permit but disclose" procedures we now apply to non-restricted informal rule making proceedings under the present Section 1.1231 of the Rules. Under these "permit but disclose" rules, presentations are prohibited during the Sunshine Agenda period. Otherwise, ex parte presentations are permissible but the substance of these presentations must be disclosed in the record of the proceeding through the filing with the Commission's secretary of either copies of written presentations or summaries of oral presentations. Under the newly proposed rules, we propose to classify all proceedings subject to these procedures as "non-restricted proceedings."

1. Inquiry Proceedings

38. Included among the categories of "non-restricted" proceedings would be any inquiry proceeding where the Commission in a notice of inquiry specifically states that the proceeding is non-restricted because it contemplates the adoption of a binding policy determination. *See 1980 Report and Order* at para. 46. As indicated in para. 30, *supra*, we do propose that other types of

inquiry proceedings not be subject to any ex parte restraints. We also invite comment on whether inquiry proceedings that are designed to assist the Commission in the development of recommendations for United States proposals for international communications conferences, e.g., World Administrative Radio Conferences (WARC), should be free of all ex parte constraints including the "permit but disclose" procedures.

2. Petitions for Declaratory Rulings

39. Other proceedings we would generally treat as "non-restricted proceedings" would be those involving requests or petitions for declaratory rulings or orders. In *Chisholm v. FCC*, 538 F. 2d 349, 364-365 (D.C. Cir. 1976), the court held that a "declaratory ruling belongs to the genre of adjudicatory rulings." Nevertheless, because such requests often involve determinations relating to broad, legislative-type policy matters, they are similar to informal rule making proceedings. Accordingly, we believe such requests generally should be governed by the less restrictive ex parte requirements that are now applied to informal rule making proceedings. It is possible, however, that a proceeding initiated by a request for declaratory order could be clearly adjudicative in nature, especially if it is contested. In such instances or if other exceptional circumstances so require, we will issue a public notice or otherwise specify that the ex parte rules for restricted proceedings are applicable.

3. Certain Common Carrier Proceedings

40. We also propose to include within the category of non-restricted proceedings most rule making proceedings conducted pursuant to the common carrier provisions of the Act or of the Communications Satellite Act, which are now listed as "restricted rule making proceedings" under Section 1.1207. We propose to treat these proceedings as non-restricted rule making proceedings for purposes of our ex parte rules unless we specify otherwise. We note that, since our rules were drafted in 1965, court decisions have clarified that proceedings under these statutory provisions are not "on the record" rule makings subject to sections 556 and 557 of the APA. *See e.g., National Association of Regulatory Utility Commissioners v. FCC*, Case No. 83-1224 (D.C. Cir. June 12, 1984) slip op. at 53; *Bell Telephone Company of Pennsylvania v. FCC*, 503 F. 2d 1250, 1265-1268 (1974), *cert. denied* 422 U.S. 1026 (1975); and *RCA Global Communications, Inc. v. FCC*, 559 F. 2d 881 (2d Cir. 1977); *see also Vermont Yankee Nuclear Power*

Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). These decisions appear to indicate that, for the most part, notice and comment procedures fully satisfy the hearing requirements of these sections of the Act. Thus, because it appears that the ex parte provisions of Section 557(d) of the APA are intended to apply only to proceedings that are required to be "on-the-record," we invite comment on whether it is appropriate to apply the less restrictive "permit but disclose" ex parte procedures to these proceedings. Assuming *arguendo* that we conclude we can do so, we invite comment on the point in these proceedings when ex parte restrictions should attach.

41. We also call attention to our proposal to treat ratemaking or tariff proceedings under Sections 204 or 205 of the Act as non-restricted proceedings for purposes of the ex parte rules but only after they have been set for investigation by the Commission. For example, we note that *American Telephone and Telegraph Company v. FCC*, 572 F. 2d 17, 22-23 (2d Cir. 1978), *cert. denied* 439 U.S. 875 (1978), appears to indicate that notice and comment procedures are adequate to satisfy the procedural requirements of Section 205(a) of the Communications Act.

4. Freedom of Information Act Requests Which Are Formally Opposed

42. Finally, we propose to include FOIA requests which are formally opposed as non-restricted proceedings. We invite comment on whether there are public interest reasons why such matters should be governed by ex parte regulation. We also seek comment on whether the more stringent ex parte procedures we intend to apply to adjudicative proceedings that are formally opposed should apply to contested FOIA requests; *e.g.*, when the materials requested are exempt material under 5 U.S.C. § 552(b)(4), the exemption relating to disclosure of trade secrets and commercial or financial information.

B. Sunshine Period Prohibition

43. Section 1.1206(b) contains the prohibition now found in Section 1.1231(a) of the rules against the making of ex parte presentations in non-restricted proceedings during the Sunshine period. Because confusion has arisen concerning the applicability of this provision in certain circumstances, we propose to clarify the scope of this prohibition. Accordingly, we intend to make clear that *all* presentations, ex parte or otherwise, are barred during this period. The prohibition, however, would apply only to

presentations made *to* decision-making personnel and, accordingly, would be inapplicable to press conferences and briefings, which traditionally follow Commission meetings and are designed to explain to the public and the press recent actions taken by the Commission. In addition, unlike the present prohibition under Section 1.1231(a), the new rule would apply to all non-restricted proceedings, not merely non-restricted rule making proceedings.

44. As under current Section 1.1231(a), we propose that the prohibition on presentations during the Sunshine period remain in effect until public release of a final order. Thus, as under the present rule relating to non-restricted rule making proceedings, the prohibition would not terminate upon adoption of the item at the Commission meeting or upon release of a public notice to that effect. However, there is a window which occurs between Commission action on an item and the release of a final order respecting that item, and it has led to questions concerning the applicability of the ex parte rules to pleadings filed during this period. We wish to make clear that the restriction on communications during this period applies to petitions for reconsideration and, accordingly, a petition under Section 405 of the Communications Act should not be filed prior to release of a final order. Generally, a petition for reconsideration or other pleading inadvertently filed during this period will be placed in the record but will not be considered by the Commission prior to expiration of the Sunshine period applicable to the matter at hand. We wish to emphasize, however, that the filing of emergency stay requests or similar pleadings where time constraints require that parties take immediate action are not meant to be precluded by the Sunshine provision. Such pleadings must, of course, be made in accordance with other Commission rules, including any procedures that may require their acceptance and consideration only upon proper motion being made to the Commission.

45. The stated rationale for establishing a cutoff was to provide "a period of repose" for Commission decision-makers so that they may be "free from any hint of external pressure so that [their] decisions may be, and be perceived to be, as objective and well reasoned as possible." *1980 Report and Order, supra*, at 1403. However, the Sunshine period cutoff has been criticized in the past because "it is precisely during final deliberations that ex parte contacts are most needed" and the "cut-off provision makes commissioners in an important degree captives of the staff ... contrary to the public interest." *Id.* at 1414 (dissenting statement of Commissioner Jones joined in by Commissioner Washburn). In

light of these concerns, we also invite comment on whether retention of a cutoff period in non-restricted informal rule makings and other non-restricted proceedings may have an unduly inhibitive effect on the decision-making process counterproductive to the public interest. In addition, in the event we determine it is beneficial to retain the Sunshine prohibition, we seek comment on whether we should expand the Sunshine restriction so that it applies to *all* proceedings placed on the Sunshine Agenda, including proceedings that would otherwise be exempt from ex parte regulation.

46. Finally, we have considered the possibility of carving out a special exception during the Sunshine period for contacts from members of Congress in non-restricted informal rule making proceedings.[25] In *Sierra Club v. Costle*, 657 F. 2d 298, 409 (D.C. Cir. 1981), the Court of Appeals observed:

> We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure.

At present, no special exception for congressional contacts in informal rule making proceedings is contained in our rules. We recognize that Congress has a special role to play in overseeing the proper exercise of the statutory responsibilities it has assigned to us. In light of this, we seek comment on whether continued application of the Sunshine prohibition to members of Congress in legislative-type proceedings would unreasonably restrict their ability to make their views known to us in order to carry out their congressional functions.

47. On the other hand, limiting our consideration to only congressional presentations during the Sunshine period could have the effect of "undermin[ing] applicable rules of procedure." *Id.* Questions of fairness might arise if other parties to the proceeding were not apprised of the existence of these communications nor afforded an opportunity to comment upon them prior to Commission action. Because the narrowly-drawn prohibition devised under the rules does not appear to have had an untoward

[25] In general, constitutional requirements of due process prohibit members of Congress from intervening on an ex parte basis in matters that involve the agency's *judicial* function. *See, e.g., Power Authority of State of N.Y. v. F.E.R.C.*, 743 F.2d 93, 110, (2d Cir. 1984); *Koniac Inc., Village of Uyak v. Andrews*, 580 F.2d 601, 611 (D.C. Cir. 1978); *see also Pillsbury v. FTC*, 354 F2d 952 (5th Cir. 1966).

effect upon Congress' ability to exercise its oversight responsibilities and may have had the positive effect of guarding against the danger of last minute "conduit" communications,[26] we do not propose to incorporate an exemption for congressional contacts during the Sunshine period. However, we expressly invite commenters to address both the proposal to continue our present policy unchanged and the alternative of making an exception to the prohibition during the Sunshine period for congressional contacts in informal rule makings.

C. "Permit But Disclose" Procedures for Non-Restricted Proceedings

48. The procedures we intend to apply to "non-restricted" proceedings would parallel the procedures contained in Section 1.1231(b) of the existing rules regarding the making of ex parte presentations in non-restricted informal rule making proceedings. However, we invite comment on whether we should incorporate provisions analogous to Section 1.1231(b)(4) which provides that the Commission will give notice of certain written and oral ex parte presentations in non-restricted proceedings. Because ex parte presentations in non-restricted proceedings are required to be included in the record of the public proceeding and because we are uncertain to what extent outside parties rely upon these notices, we invite comment on whether they should be retained. Similarly, Section 1.1231(b)(5), which permits responses to any ex parte presentation made in non-restricted proceedings, appears to be a superfluous requirement since any person has the opportunity to make an ex parte presentation (prior to the Sunshine Agenda period) whether or not it is responsive to previously filed comments or presentations.

49. One particular aspect upon which we seek comment, however, is whether persons should be permitted to make, but not disclose, ex parte presentations covering matters addressed in the comments or previously filed presentation of others. The existing rules and our proposed rules would require the filing of a written presentation or a summary of an oral presentation whenever the presentation goes beyond the comments or presentations previ-

[26] By "conduit" communications, we mean those communications made by governmental officials, elected or appointed, who act as conduits for private parties in order to make known to the agency "off-the-record" the views of the latter. *See Sierra Club, supra,* at 405 n. 520; *also* Verkuil, "Jawboning Administrative Agencies: Ex Parte Contacts by the White House," 80 *Columbia L. Rev.* 943, 985-986 (1980).

ously made by *that* party even if the matters addressed are covered by comments or presentations filed by others in the proceeding. We invite comment on this point.

VI. RESTRICTED PROCEEDINGS

50. We propose to simplify the rules by spelling out the prohibitions applicable to "restricted" proceedings in new subsections 1.1208(a) and (b) and assimilating existing Sections 1.1203 and 1.1207 relating to "restricted adjudicative" and "restricted rule making" proceedings into a single section (Section 1.1208) governing "restricted proceedings." Integration of these provisions is not intended to effectuate substantive changes except those that are discussed below.

A. Ex Parte Presentations Prohibitied in Restricted Proceedings

51. Section 1.1208(a) explicitly provides that unless exempted under Section 1.1204(b), ex parte presentations are prohibited in restricted proceedings and that the prohibition continues in effect until the proceeding has been settled and is no longer reviewable by either the Commission or the courts. It is basically a restatement of existing rules regarding ex parte presentations in restricted proceedings.

B. Persons Planning To File Oppositions or Other Pleadings Which Would Make A Proceeding Restricted

52. Section 1.1208(b) would be new. It is aimed at those instances where a person plans to file an opposition, objection, or a mutually exclusive application, any of which would warrant classification of a proceeding as "restricted" but has deliberately delayed the filing in order to make an ex parte presentation. In the 1965 *Report and Order, supra*, at 52, we specifically stated:

> [P]resentations should not be made if the person making the presentation has knowledge of matters which will warrant the classification of the proceeding as a restricted proceeding. Ex parte presentations should not be made, for example, by a person who is planning to file a petition to deny or a mutually exclusive application, if the same presentation would be prohibited after the petition or application has been filed.

This proposed amendment would merely codify this existing policy into the rules so that the public and practioners before this agency are apprised under the rules that such activity is not permissible under our ex parte standards.

C. Categories of Restricted Proceedings

53. Under Section 1.1208(c), restricted proceedings would include the following categories of proceedings, many of which are already subject to the more restrictive ex parte rules: adjudicative proceedings that have been designated for formal hearing; adjudicative proceedings that are formally opposed or are the subject of mutually exclusive applications; and *Sangamon*-type informal rule making proceedings or, as more recently characterized, "allotment" proceedings.[27] We intend no change from the *1980 Report and Order, supra*, at 1396, where we stated that the *Sangamon*-type category of restricted informal rule making proceedings will generally be limited to allotment proceedings involving FM and TV channels. As we stated therein, consistent with our current practice, we will to the extent possible specify at the outset of each proceeding whether "competing claims" are involved so that the public is aware of what rules to follow. *Id.* It should be noted that this proposal would subject all contested adjudicative proceedings to ex parte rules (unless the proceeding is expressly governed by section 1.1204 or 1.1206) and thus would cover some proceedings not expressly mentioned in the existing rules. However, we believe this proposal is consistent with the policy in the 1965 *Report and Order* that parties' conduct should be governed by considerations of "fundamental fairness," even where ex parte prohibitions are not expressly contained in the rules. *See id.* at 52. By expanding the category of proceedings subject to ex parte restraints to expressly encompass contested adjudicatory matters we can avoid an unnecessary ambiguity created by our existing rules.

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[27] By "allotment" proceedings, we refer to the type of proceeding which the Court in the *Sangamon* case held involves "resolution of conflicting private claims to a valuable privilege," generally, a proceeding involving request by one party to have a radio or television broadcast channel designated to a community of license different from that already specified or authorized by the Commission. It differs from "assignment" proceedings which generally involve the selection of one applicant over others to operate as a licensee on a particular frequency. In *Report and Order in 80-90*, 53 RR 2d 1550, 1573 (1983), the Commission decided that the term "allotment" rather than the term "assignment" should be used since the use of the term "allotment" more clearly conforms with the nomenclature adopted at the 1979 World Administrative Radio Conference of International Telecommunications Union. The Commission stated that "a channel may be *allotted* to a community or place but *assigned* to a licensee" (emphasis in original) and that a "plan of potential channel designations should be referred to as Table of Allotments." Thus, use of this term in the proposed ex parte rules would refer to *Sangamon*-type proceedings involving the competing claims with respect to allotment of radio or television spectrum to a specific geographical area.

54. The new category of "restricted proceedings" would also include proceedings conducted under the common carrier provisions of the Communications Act or the Communications Satellite Act of 1962, most of which are currently listed as "restricted adjudicative proceedings" under Section 1.1203 and some of which are now classified as restricted rulemakings. In addition, it would specifically include Section 208 proceedings involving "formal" complaints against a common carrier and pole attachment proceedings conducted pursuant to Section 224 of the Communications Act.

VII. PROHIBITION ON SOLICITATION OF EX PARTE PRESENTATIONS

55. Section 1.1210 of the proposed rules would prohibit the solicitation of ex parte presentations by others. This section is essentially identical to the present Section 1.1225. As indicated earlier, however, we invite comment on whether we should continue to prohibit the solicitation of status inquiries by others.

VIII. PROCEDURES FOR HANDLING OF PROHIBITED EX PARTE PRESENTATIONS

56. *Sections 1.1212 Procedures for Handling of Prohibited Ex Parte Presentations.* This section is essentially a consolidation of present Sections 1.1241 and 1.1243 and is not intended to substantially change the procedures separately specified in those provisions for handling written and oral ex parte presentations. However, we find it necessary to point out that Sections 1.1241(d) and 1.1243(d), which provide for service by the Managing Director (formerly Executive Director) upon parties to a proceeding of copies of *unauthorized* ex parte communications are not intended to cure the failure of the person making such communication to meet his original obligation to serve the other parties to the proceeding. The purpose of these provisions is merely to apprise parties that a procedural irregularity in the nature of an unauthorized presentation has occurred in the proceeding. As indicated in Sections 1.124(c) and 1.1243(c) of the Rules, unauthorized communications are not made a part of the record of the proceeding except when they are expressly considered by decision-making personnel. Service of copies of an unauthorized communication after it has already been made is not intended to remedy the notice to which parties to the proceeding originally were entitled nor is it intended to permit them an additional opportu-

nity to comment in the proceeding especially where the matter has been placed on the Sunshine Agenda for final disposition by the Commission. Accordingly, we propose a change from the existing rules to provide that when a prohibited ex parte presentation has occurred, the Managing Director shall provide notice to the parties to a proceeding that such a presentation has occurred but shall *not* be required to serve copies of the prohibited presentation except if he determines that there are public interest reasons that warrant disclosure of such information.

IX. MISCELLANEOUS PROVISIONS

57. *Sections 1.1214 Disclosure of Information Concerning Ex Parte Presentations and Section 1.1216 Sanctions.* These sections are essentially identical to the present Sections 1.1245 and 1.1251. Minor changes of language are proposed to conform these provisions with our other proposals and to reflect the present title of "Managing Director" for the person formerly designated as "Executive Director" in the present rules.

X. ADMINISTRATIVE MATTERS

58. Authority for this proposed rulemaking is contained in Sections 4(i), 4(j), 303(r) and 409 of the Communications Act of 1934, as amended, (47 U.S.C. §§ 154(i), 154(j), 303(r) and 409). Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before September 2, 1986, and reply comments on or before September 17, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the Commission's reliance on such information is noted in the Report and Order.

59. In this non-restricted rule making proceeding, ex parte contacts are permitted from the time the Commission adopts this Notice of Proposed Rule Making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting, or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. An ex parte presentation is any written or oral presentation (except written comments, reply comments, and

formal oral arguments in the proceeding) made to decision-making personnel by another person which is not served on the parties to the proceedings. Any person who submits a written ex parte presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral ex parte presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, the summary must be submitted to the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally Section 1.1231 of the Commission's Rules (47 C.F.R. § 1.1231).

60. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis ("IRFA") of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix "B". Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice, including the IRFA to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, (5 U.S.C. § 603(a)) and the Director, Office of Information and Regulatory Affairs, Office of Management and Budget, in accordance with the Paperwork Reduction Act, (44 U.S.C. § 305 *et seq.*). The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no significant new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and should not result in a material increase or decrease in burden hours imposed on the public.

61. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Persons wishing to participate informally

may submit one copy of their comments, stating thereon the docket number of this proceeding. Comments and reply comments should be sent to Office of Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Public Reference Room (Room 239) at that address. For additional information on this proceeding, contact Steve Bailey, Office of the General Counsel, (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

Proposed Rule Amendments

Part 1 (Practice and Procedure) of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read:

Authority: Sections 4, 303, 409, 48 Stat. 1066, 1082, 1096, as amended; 47 U.S.C. §§ 154, 303, 409.

2. Sections 1.1201 through 1.1251 of Subpart H are removed; and

3. Subpart H is revised to read as follows:

SUBPART H — EX PARTE COMMUNICATIONS

GENERAL

Section 1.1200(a) *Purpose.* To ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process, the Commission has prescribed rules and regulations governing ex parte communications. These rules and regulations, which are designed to deter improper communications and maintain the utmost public confidence in Commission proceedings, specify minimum standards of conduct and procedures to be followed with regard to ex parte presentations in Commission proceedings and provide for the imposition of sanctions for violations of these standards and procedures.

(b) *Introduction.* These rules set forth the ex parte requirements that apply in various types of Commission proceedings. Following Section 1.1202 (Definitions), the rules describe three general classes of FCC proceedings. First, Section 1.1204(a) lists types of proceedings in which there are no ex parte restrictions. In these proceedings, parties and Commission decision makers may communicate freely, without regard to the prohibitions and disclosure requirements of these ex parte rules. Next, Section 1.1206(c) lists proceedings that are classified as "non-restricted." In non-restricted proceedings, parties and Commission decision makers are permitted to engage in ex parte communications but certain disclosure requirements must be met. In addition, in non-restricted proceedings certain periods are set aside during which all

communication with Commission personnel is prohibited. *See* Section 1.1206(b). Finally, Section 1.1208(c) lists proceedings that are classified as "restricted." In restricted proceedings, ex parte communications are generally prohibited.

The prohibitions and requirements applicable to "restricted" and "non-restricted" proceedings are subject to certain general exceptions, which are listed in Section 1.1204(b). Therefore, Section 1.1204(b) should always be examined to determine whether a seemingly prohibited ex parte communication may be permissible.

NOTE: Inquiries concerning the propriety of ex parte communications should be directed to the Office of General Counsel.

Section 1.1202 *Definitions*

(a) *Presentation.* Any communication directed to the merits or outcome of a proceeding. Excluded from this term is a communication inadvertently or casually made and which only relates incidentally to the merits or outcome of the proceeding, or an inquiry or request for information relating solely to the status of a proceeding.

NOTE: A status inquiry which states or implies a preference for a particular party or position in a proceeding, or which states why timing is important to a particular party, or in any other manner as a means, direct or indirect, to address the merits or outcome of a proceeding in an ex parte presentation.

(b) *Ex parte presentation.* Any presentation made to decision-making personnel and, in restricted proceedings, any presentation to or from decision-making personnel which

(1) if written, is not served on the parties to the proceeding or

(2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.

NOTE: Comments and reply comments in informal rule making proceedings pursuant to §§ 1.415 and 1.419 are not considered ex parte presentations even if they are not served on other parties.

(c) *Decision-making personnel.* Any member, officer or employee of the Commission who is or may reasonably be expected to be involved in the decisional process in the proceeding. Unless otherwise specified, such persons usually include the Commissioners, their assistants, and other professional personnel of the Commission. Any person who has been made a party to a proceeding or who otherwise has been excluded from the decisional process shall not be treated as a decision-maker with respect to that proceeding. Thus, any person designated as part of a separated trial staff shall not be considered a decision-making person in the designated proceeding. Unseparated Bureau or Office staff who may reasonably be expected to become involved in the decisional process of the proceeding shall be considered decision-making personnel.

(d) *Adjudicative proceeding.* A proceeding, other than a rule making (including a tariff proceeding involving future rates or practices), initiated upon the Commission's own motion or by the filing of an application, formal complaint, waiver request, petition for special relief, or other similar pleading that involves an authorization or action pertaining to specific entities or persons.

(e) *Formal opposition.* A pleading opposing the grant of a particular application, waiver request, petition for special relief or other request for Commission action which meets the following requirements:

(1) The caption and text of the pleading make it unmistakably clear that the pleading is intended to be a formal opposition;

(2) The pleading is served upon the other parties to the proceeding; and

(3) The pleading is timely filed.

(f) *Sunshine Agenda period.* For purpose of this subpart, the Sunshine Agenda period is defined as that period of time between which a draft order proposing a substantive disposition of the proceeding is placed on the Sunshine Agenda and the Commission

(A) releases a final order, or

(B) issues a public notice stating that the matter has been deleted from the Sunshine Agenda, or

(C) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever one of the above occurs first.

GENERAL EXEMPTIONS

Section 1.1204(a) *Proceedings in which no ex parte restrictions apply.* Subject to the provisions of Section 1.1208(b), there are no ex parte restraints or disclosure requirements in the following types of proceedings:

(1) any adjudicative proceeding as defined in Section 1.1202(d) unless it

(A) is formally opposed; or

(B) involves mutually exclusive applications; or

(C) has been designated for hearing, *see* Section 1.1208(c)(1)(A);

NOTE: In proceedings exempted by subsection 1.1204(a) ex parte communications are permissible only between the Commission and the formal party involved.

(2) a pending petition for rule making unless it involves the allotment of a channel in the radio broadcast or television broadcast services and is formally opposed, *see* Section 1.1208(c)(2);

(3) a notice of inquiry proceeding unless the Commission states otherwise, *see* Section 1.1206(c)(2);

(4) a request for information which is filed pursuant to the Freedom of Information Act, 5 U.S.C. § 552, unless it is formally opposed, *see* Section 1.1206(c)(6);

(5) a proceeding involving an informal complaint against a carrier under Section 208 of the Communications Act (see Section 1.711 of the Rules) unless it has been designated for hearing; or

(6) a tariff proceeding under Section 203, 204 or 205 of the Communications Act unless it has been set for investigation or designated for hearing, *see* Section 1.1206(c)(5).

(b) *Exempt Ex Parte Presentations.* The following types of ex parte presentations are exempt from the prohibitions and requirements in Section 1.1206 (non-

restricted proceedings) and Section 1.1208 (restricted proceedings):

(1) the presentation is authorized by statute or by the Commission's Rules, *see, e.g.*, Section 1.333(d);

(2) the presentation is made by or to the General Counsel or his staff and concerns judicial review of a matter which has been decided by the Commission;

(3) the presentation directly relates to an emergency in which the safety of life is endangered or substantial loss of property is involved;

(4) the presentation involves a military or foreign affairs function of the United States or involves classified security information;

(5) the presentation is requested by the Commission staff for the clarification or adduction of evidence or for resolution of issues in an adjudicatory proceeding which has not been designated for hearing or in a non-restricted proceeding, provided that any new written information elicited from such a communication and not already reflected in the record of the proceeding shall be served upon the other parties to the proceeding. A summary of any oral information elicited from such a communication and not already reflected in the record of the proceeding shall be served upon the other parties to the proceeding. Any such request made by Commission staff shall not be deemed an ex parte presentation.

NON-RESTRICTED PROCEEDINGS

Section 1.1206 *Non-restricted proceedings; ex parte presentations generally permissible but subject to disclosure.*

(a) Except during the Sunshine Agenda period (*see* Section 1.1206(b)), ex parte presentations are permissible in non-restricted proceedings if the following disclosure requirements are met:

(1) *Written ex parte presentations made by persons outside the Commission.* Any person who makes or submits a written ex parte presentation shall provide on the same day it is made or submitted a copy of it under separate cover to the Commission's Secretary for inclusion in the public record. The presentation must indicate on its face the docket number of the particular proceeding(s) to which it relates and that a copy of it has been submitted to the Secretary.

(2) *Oral ex parte presentations made by persons outside the Commission.* Any person who in making an oral ex parte presentation presents data or arguments that are not already reflected in that person's written comments or in an ex parte presentation previously filed in that proceeding by that person shall provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments.

(3) *Ex parte presentations requested by persons within the Commission and spontaneous ex parte presentations.* A decision making person who requests an ex parte presentation or is involved in a spontaneous ex parte presentation should ensure that the presentation is reflected in the public record before the Commission issues a final order in the relevant proceeding. Any person who makes a presentation under this paragraph shall comply with the requirements of paragraph (a)(1) or paragraph (a)(2) whichever is applicable.

(4) *Filing of ex parte presentations.* The Commission's Secretary shall place in the public file or record of the proceeding written ex parte presentations and memoranda reflecting oral ex parte presentations.

(b) Unless exempted under Section 1.1204(b), the making of any presentation, whether ex parte or not, is prohibited during the Sunshine Agenda period. *See* Section 1.1202(f).

(c) Unless otherwise ordered by the Commission, a non-restricted proceeding includes:

(1) an informal rule making proceeding conducted under section 553 of the Administrative Procedure Act (upon Commission adoption of a notice of proposed rulemaking), unless the proceeding concerns the allotment of a specific channel in the radio or television broadcast services, Section 1.1208(c)(2);

(2) an inquiry proceeding (upon Commission adoption of a notice of inquiry) where the Commission specifically states the proceeding is non-restricted because it contemplates adoption of a binding policy determination;

(3) a petition or request for declaratory ruling at the time a formal opposition to the petition has been filed;

(4) a rule making proceeding conducted pursuant to sections 201(a), 213(a), 221(c) or 222 of the Communications Act or sections 201(c)(2) or 201(c)(5) of the Communications Satellite Act of 1962, if the proceeding has been formally opposed or has been set for investigation by the Commission.

(5) a tariff proceeding which has been set for investigation by the Commission under Section 204 or 205;

NOTE: Proceedings under the statutory provisions listed in 1.1206(c)(4) and 1.1206(c)(5) that pertain primarily to *past* rates or practices of common carriers may be adjudicative proceedings subject to the provisions of section 1.1208. *See* 5 U.S.C. § 551(4); 47 U.S.C. § 409(c)(1)(2)(d); *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971).

(6) a proceeding involving a request for information filed pursuant to the Freedom of Information Act, 5 U.S.C. § 552, upon the filing of a formal opposition to the request.

RESTRICTED PROCEEDINGS

Section 1.1208 *Restricted Proceedings.*

(a) Unless exempted under Section 1.1204(b), ex parte presentations are prohibited in restricted proceedings. The prohibition continues in effect until the proceeding has been decided or a settlement or agreement by the parties has been approved by the Commission and such decision or approval is no longer subject to reconsideration by the Commission or to review by any court.

(b) No person shall make an ex parte presentation in a proceeding even though the proceeding is not restricted if

(1) that person intends to file a mutually exclusive application which would cause the proceeding to become restricted; or

(2) that person intends to file an opposition or objection which would cause the proceeding to become restricted.

NOTE: Informal complaint proceedings under Section 208 are not governed by Section 1.1208(b)(2) until a formal complaint is filed.

(c) Unless governed by Section 1.1204 or Section 1.1206, the following are restricted proceedings:

(1)(A) any adjudicative proceeding, including any proceeding conducted pursuant to section 303(1) (classification and qualifications of radio station operators); section 303(m) (suspension of radio licenses); sections 308 and 309 (application for licenses); section 310 (holding and transfer of licenses); section 312 (administrative sanctions); section 315 (facilities for candidates for public office); section 316 (modification of construction permits or licenses) of the Communications Act; cable television special relief or waiver proceedings;

(B) proceedings under section 206 (liability of carriers for damages); section 207 (recovery of damages); section 208 (complaints); section 212 (interlocking directorates); section 214(a) or 214(d) (line extensions); section 221(a) (telephone consolidations and acquisitions); section 224(b)(1) (pole attachments) of the Communications Act;

(C) proceedings under sections 201(c)(6), (7), (9) or 304(f) of the Communications Satellite Act of 1962;

from the day on which any of the following has occurred:

(I) the release of an order designating the proceeding for hearing (unless a hearing has been subsequently waiver pursuant to section 1.92 of this chapter);

(II) the filing of a formal opposition or formal complaint;

(III) the release of a public notice apprising the public of the filing of a mutually exclusive application *provided, however*, that if a person has actual knowledge that a mutually exclusive application has been filed prior to the release of the public notice, that person is prohibited from making an ex parte presentation from the moment of such actual knowledge. The term "public notice" as used in this subsection means the public notice issued at regular intervals listing all applications and major amendments thereto which has been tendered (or, in non-broadcast services, accepted) for filing. (*See* Sections 1.564(c), 1.962(e) and 21.27(b) of this chapter.) When the Commission issues a specific public notice stating that there is a possibility of conflict between the applications, then the term "public notice" shall refer the specific public notice rather than that issued at regular intervals.

(2) an informal rule making proceeding concerning the allotment of a channel in the radio broadcast or television broadcast services (*see Sangamon Valley Television Corporation v. United States*, 269 F. 2d 221, 224 (D.C. Cir. 1959)) at the time of adoption of the notice of proposed rule making or the filing of an opposition to a petition for rule making, whichever is earlier;

(3) any other proceeding which the Commission designates as restricted.

PROHIBITION ON SOLICITATION OF EX PARTE PRESENTATIONS

Section 1.1210 *Prohibition on Solicitation of Ex Parte Presentations.* No person shall solicit or encourage others to make any ex parte presentation which he or she is prohibited from making under the provisions of this subpart.

PROCEDURES FOR HANDLING OF PROHIBITED EX PARTE PRESENTATIONS

Section 1.1212 *Procedures for Handling of Prohibited Ex Parte Presentations.*

(a) If a prohibited oral ex parte presentation is initiated, the person to whom it is addressed shall advise the person initiating it that such presentation is prohibited and terminate the discussion.

(b) If a prohibited oral ex parte presentation has been made, the Commission personnel to whom the presentation was made shall forward to the Managing Director a statement containing the following information:

(1) The name of the proceeding.

(2) The name and address of the person making the presentation and that person's relationship (if any) to the parties to the proceeding or their attorneys.

(3) The date and time of the presentation, its duration, and the circumstances (telephone, personal interview, casual meeting, etc.) under which it was made.

(4) A brief summary of the presentation.

(5) Whether the person making the presentation persisted in doing so after having been advised that the presentation was prohibited.

(6) The date and time at which the statement was prepared.

(c) Written ex parte presentations which are prohibited shall be forwarded by the person receiving them to the Managing Director. If the circumstances in which such a presentation was made are not apparent from the presentation itself, a statement describing those circumstances shall be submitted to the Managing Director with the presentation.

(d) Prohibited *written* ex parte presentations, all statements and correspondence relating thereto, all statements and correspondence relating to prohibited *oral* ex parte presentations shall be placed in a public file which shall be associated with, but not made a part of, the file or record of the proceeding to which the presentations pertain. In a proceeding which has not yet been designated for hearing, no such presentations, statements or correspondence relating thereto, shall be considered in determining the merits of the proceeding except upon notice and disclosure to the parties to the proceeding. Once a proceeding has been designated for hearing, such materials may be considered in determining the merits of a restricted proceeding only if they are made a part of the record of the proceeding.

(e) If the Managing Director determines that an ex parte presentation is prohibited by this subpart, he shall notify the parties to the proceeding that a prohibited ex parte presentation has occurred. If the Managing Director determines that there are public interest reasons which warrant disclosure of the prohibited presentation, he shall serve upon the parties to the proceeding copies of the presentation or, if it was oral, a summary of the presentation, as well as any statements or correspondence describing the circumstances in which it was made. Service by the Managing Director shall not be deemed to cure any violation of the rules against prohibited ex parte presentations.

(f) If circumstances satisfy the Managing Director that notice of a prohibited presentation under subsection (e) would be unduly burdensome because the parties to the proceeding are numerous, he may (in lieu of notice to the parties) issue a public notice that a prohibited presentation has been made in the proceeding. Where a determination has been made that disclosure of the prohibited presentation would be appropriate under subsection (e) and circumstances satisfy the Managing Director that service of copies of the prohibited presentation would be unduly burdensome because the parties to the proceeding are numerous or because the materials relating to the presentation are

voluminous, he may issue a public notice that copies of the presentation and/or materials relating to it are available for public inspection.

(g) A copy of any statement describing the circumstances in which any prohibited ex parte presentation was made shall be forwarded to the person who made the presentation. Within 10 days thereafter, the person who made the presentation may file with the Managing Director a notarized statement regarding the presentation and the circumstances in which it was made. If the Managing Director deems it appropriate, he shall serve copies of the notarized statement upon parties to the proceeding.

Section 1.1214 *Disclosure of Information Concerning Violations of this Subpart.* Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed, shall promptly advise the Managing Director in writing of all the facts and circumstances concerning the matter which are known to him.

SANCTIONS

Section 1.1216 *Sanctions.*

(a) *Parties.*

(1) Upon notice and hearing, any party to a restricted proceeding who directly or indirectly violates or causes the violation of any provision of this subpart, or who fails to advise the Managing Director of the facts and circumstances concerning any such violation, may be disqualified from further participation in that proceeding. Such alternative or additional sanctions as may be appropriate may be imposed.

(2) To the extent consistent with the interests of justice and the public, a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected.

(b) *Commission personnel.* Violations of the provisions of this subpart by Commission personnel shall be disposed of in accordance with Administrative Order No. 10 and the penalties therein specified.

(c) *Other persons.* Such sanctions as may be appropriate under the circumstances shall be imposed upon other persons who violate the provisions of this subpart.

(d) The sanctions outlined in paragraphs (a)(1), (b), and (c) of this section shall also apply in non-restricted rulemaking proceedings, but the sanction outlined in paragraph (a)(2) shall not apply in such proceedings.

Appendix B

Initial Regulatory Flexibility Analysis

I. Reason for Action:

The Commission has prepared this Initial Regulatory Flexibility Analysis in accordance with Section 603 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 603. The purpose of this proceeding is to improve the Commission's rules and regulations in Subpart H, Part 1 of the Commission's Rules and Regulations governing the making of ex parte communications and presentations in Commission proceedings.

II. Objectives:

The objectives of this proceeding are (1) to simplify the ex parte rules and regulations to insure that all parties understand the constraints that apply to communications with agency decision-makers and (2) to conform the rules and regulations as closely as possible with the provisions of the Administrative Procedure Act and with existing agency practice so that they better reflect applicable law and sound practice.

III. Legal Basis:

Authority for issuance of this rule making is contained in Sections 4(i), 4(j), 303(r), and 409 of the Communications Act of 1934, as amended, (47 U.S.C. §§ 154(i), 154(j), 303(r), and 409).

IV. Description, Potential Impact and Number of Small Entities Affected:

Since the purpose of the proposed amendments is to simplify the rules and conform them to existing agency practice and the APA's provisions governing agency proceedings, the proposed amendments should not increase in any significant manner the obligations of persons participating in agency proceedings under the existing ex parte rules. Accordingly, they should not have a significant negative or adverse impact on small entities engaged in Commission proceedings.

V. Recording, Record Keeping and Other Compliance Requirements:

The proposed amendments should not result in any significant adverse impact imposed upon small business entities in terms of recordkeeping, reporting requirements, or other additional costs.

VI. Federal Rules which Overlap, Duplicate or Conflict with these Rules:

None.

VII. Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives:

None.

VIII. Conclusion:

The Commission does not envision any significant negative or adverse impact on small entities resulting from this proceeding.

Financial Qualifications
Site Availability

Case remanded to determine whether first applicant had reasonable assurance site was available for intended use and to determine if second applicant's certification of its financial qualifications in its original application was *bona fide*.
— *George Edward Gunter*
MM Docket No. 83-1305

FCC 86R-53

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GEORGE EDWARD GUNTER Jacksonville, Texas	MM DOCKET NO. 83-1305 File No. BPH-820916AG
Kathy Johnson d/b/a KIRK BROADCASTING COMPANY Jacksonville, Texas	MM DOCKET NO. 83-1306 File No. BPH-830215AB
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1986; Released: August 18, 1986

By the Review Board:

1. Kathy Johnson, doing business as Kirk Broadcasting Co., has filed a "Petition to Set Aside Initial Decision of Administrative Law Judge Joseph Gonzalez," (FCC 86D-10, released February 18, 1986.) In her *pro se* pleading Johnson has referenced alleged errors in this comparative case to select a broadcaster to establish a new FM Station in Jacksonville, Texas. The victorious applicant, George Edward Gunter, responded with a motion to

strike Johnson's pleading, and for dismissal of the Kirk Broadcasting application. Based on its own review of the record, the Review Board has concluded that the public will be better served by a further and expeditious consideration of two basic qualifications issues.

2. First, the ALJ's undisputed findings establish that: "Ms. Johnson did not have reasonable assurance of the availability of her first two antenna sites" (Initial Decision (ID), paras. 15–23) and therefore that applicant was not basically qualified. Second, substantial and material questions remain to be resolved concerning the financial showing of George Edward Gunter, who filed "a multitude" of low powered TV, and other applications "totalling in excess of fifty (50)." Johnson petition p. 2.

3. In the Initial Decision Johnson was awarded a slight to moderate comparative character demerit because of her ineptness with respect to her two antenna sites. ID para. 23. Gunter was awarded a "very slight" character demerit for an inadvertent violation of the reporting requirements. ID para. 14. Both applicants suggest in their pleadings that these demerits are no longer relevant because of the Commission's new *Character Policy Statement*, 102 FCC 2d 1179, 59 RR 2d 801 (1986). The Board agrees that both comparative demerits assessed by the ALJ are now moot and should be disregarded. *See Broadcast Associates of Colorado*, FCC 86-215, released May 9, 1986, ("we no longer assess character demerits in comparative broadcast proceedings"). Nevertheless, the Board's review of the record has revealed two *basic* qualification issues which must be resolved before *either* application can be granted. See *Guinan* v. *FCC*, 297 F.2d 782 (D.C. Cir. 1961).

4. First, the undisputed findings establish that Ms. Johnson lacked a reasonable basis for representing to the Commission that several different sites were in fact available. ID paras. 15–23. Because no evidence of deliberate misrepresentation with respect to the availability of these sites was found by the ALJ, Ms. Johnson was not disqualified for misrepresentation or lack of candor. ID para 23. However, no conclusion was reached on the related basic qualification issue of whether Ms. Johnson had "reasonable assurance at the time the Commission was advised of the proposed antenna sites that they would be available for their intended use" ID para. 5. Past and recent Commission precedent establish that an applicant must have reasonable assurance that its transmitter site is available at the time its application is either filed or amended. See *Alden Communications Corp.*, 59 RR 2d 259

(Rev. Bd. 1985). We therefore remand the case so that this issue may be resolved in view of the undisputed findings and controlling Commission precedent. *See e.g., Mary Ann S. Bohi*, FCC 86R-21, April 11, 1986, Separate Statement discussing recent precedents, and *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n. 12 (Rev. Bd. 1984), ("an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with....")

5. The second basic qualification issue which requires a remand in this case concerns the possible false certification of financial qualifications by Gunter. On May 1, 1984, Johnson requested a financial qualifications issue against Gunter. By *Memorandum Opinion and Order*, FCC 84M-2835, released June 22, 1984. The ALJ, while noting that the Bureau (in its *Hearing Designation Order*, 48 Fed. Reg. 56437, published December 21, 1983) found Gunter to be financially fit on the basis of his financial certification, held that the "considerable number" of broadcast station applications filed by Gunter which were pending before the Commission warranted the designation of a sufficiency of funds issue. Accordingly, the ALJ specified the following issue: "To determine whether George E. Gunter has sufficient net liquid assets available to construct and operate his proposal in view of his other broadcast construction and operation financial commitments." In her motion, Johnson had pointed out that on March 5, 1984, in another proceeding (Pine Bluff, Arkansas, MM Docket No. 83-1403), an identical issue had been added against Gunter premised on an allegation that he then had pending some 24 other applications, but that the issue was never tried because subsequent to enlargement, Gunter dismissed his application.

6. With regard to the issue added in this proceeding, Gunter moved on August 27, 1984 for summary decision and by *Memorandum Opinion and Order*, FCC 84M-4786, released November 13, 1984, the ALJ granted Gunter's motion and resolved the financial qualifications issue in his favor. The ALJ found that Gunter had submitted documentation in support of his motion intended to show that he had adequate financing available for each of his broadcast applications including his instant Jacksonville FM proposal. The documentation included funding from various sources including a bank loan, Mr. Gunter's assets, a contribution from a limited partner, and leasing arrangements with equipment suppliers. Based on this showing, the ALJ found that Gunter's overall cost requirements totalled $561,670.31 whereas his available funds came to $591,343.18, leaving him a

cushion of $30,000. Additionally, the ALJ noted that Gunter's net worth was in excess of $852,000. The judge concluded that no material question of fact remained with respect to Gunter's financial qualifications.

7. Johnson now renews her challenge to Gunter's financial qualifications, alleging that Gunter has a multitude of low power TV, UHF, VHF, FM, and AM applications totalling in excess of 50, and concludes that a hearing is still necessary to determine if Gunter has sufficient net liquid assets to finance his proposal in view of all his other commitments. Petition p. 2. Gunter's responsive pleading does not dispute the number of other pending applications alleged by Johnson, but merely claims that the ALJ's award of summary decision was appropriate. With this conclusion we disagree, and therefore remand for further hearing.

8. It appears from the information submitted by Gunter in support of his motion for summary decision that his principal source of financing derives from net loan proceeds from the First National Bank of Arcadia, Louisiana. Specifically, Gunter submitted a commitment letter from the Bank dated August 20, 1984 for a line of credit of up to $500,000. This commitment letter, however, was obtained subsequent to designation of the financial qualifications issue against Gunter and, so far as we can determine on the present record, was not available to Gunter at the time he certified to his financial fitness in his application. The current version of the Commission's broadcast application form requires an applicant to certify that it has sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facilities for three months without revenues. Furthermore, if, as is the case here, the applicant means to rely for some or all of its financing on others such as banks or financial institutions, it must certify that it has reasonable assurance of a present firm intention for each agreement to furnish financing. *See Revision of Application Form 301*, 50 RR 2d 381, 397 (1981); *Dutchess Communications Corp.*, 101 FCC 2d 243, 244-6 (Rev. Bd. 1985); *GACO Communications Corp.*, 94 FCC 2d 761, 775 (Rev. Bd. 1984), *rev. denied*, FCC 84-212, released May 14, 1984. Thus, despite his more recent showing, we cannot determine in the absence of a hearing on this question whether Gunter was financially qualified *ab initio* -- that is at the time of his certification. Accordingly, we will remand Gunter's application to determine whether his certification was *bona fide*.*

* Our concern here is not a purely theoretical one. Whether at the time Gunter had 24 applications pending, as stated in the Pine Bluff, Arkansas proceeding --

9. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED for further proceedings consistent with this opinion and for preparation of such Supplemental Initial Decision as may be warranted by a supplemental record.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

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see also Central Alabama Broadcasters, Inc., 97 FCC 2d 654, 656 n. 4 (Rev. Bd. 1984) — or 50 applications, as alleged in this proceeding, the number is considerable, and we again note that applicants apparently continue to misread the Commission's certification procedure as a weakening of its financial qualifications standards. *See Dutchess Communications Corp., supra*, at 245 n. 3.

Rulemaking, Notice of Proposed
Television, Low Power
Translator

Notice of Proposed Rulemaking adopted to modify rules governing low power TV and TV translator service. Commission is convinced that rules, policies and processes should not hinder the potential viability of low power TV stations or inhibit expansion of TV translator service.
— *Low Power TV/TV Translator Service*

FCC 86-303

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re	
Low Power Television and Television Translator Service	MM Docket No. 86-286

NOTICE OF PROPOSED RULE MAKING

Adopted: June 26, 1986; Released: July 9, 1986

BY THE COMMISSION; COMMISSIONER DENNIS NOT PARTICIPATING:

1. The Commission, on its own motion, here proposes to modify the rules governing the low power television and television translator service in two specific ways. First, we contemplate alteration of the application filing procedures in this service. Currently, applications proposing locations in the 48 contiguous states may be tendered only during a nationwide window or date certain filing period. We seek comment on possible changes to that unrestricted nationwide approach that would allow us to better control the flow of applications, process applications more efficiently, and open filing windows at more regular intervals. Second, we propose to modify the authorization of a low power television or television translator station that is displaced from operating on its output channel by the land mobile radio service or by a full service television station. We propose to allow such

permittees and licensees to specify operation on another channel without facing challenge from competing applicants.

2. These proposals are based on our conviction that our rules, policies and processes should not hinder the potential viability of low power television stations or inhibit the expansion of television translator service. We have been encouraged by the interest in the low power television service since its inception. We have now authorized over 1,675 low power television stations; additionally, more than 5,200 television translator stations are authorized, any of which could begin to originate programming upon notification to the Commission.[1] Construction of new stations, admittedly, has not progressed at a very rapid rate.[2] However, it remains our expectation that low power television will continue to expand consumer viewing choices by providing "programming that is directly responsive to the interests of small audience segments." *Report and Order in BC Docket No. 78-253*, 51 RR 2d 476, 525 (1982)(Statement of Fowler, Chairman). At the same time, we "recognize the contribution that the traditional television translator has played in providing television service to areas where direct reception of full-service television stations is hindered by distance or intervening terrain barriers." *Report and Order in MM Docket No. 83-1350*, 102 FCC 2d 295, 302 (1984). We will continue to be sensitive to those needs as well.

3. We emphasize, however, that this proceeding is limited only to the filing window and displacement issues. We are not reopening the record for general comments on other issues affecting the service. Input is requested only as to whether we might properly limit the number of applications filed in a given window and/or the geographic area in which applications may be filed, and whether we might permissibly modify the construction permit or license of a displaced low power television or television translator station to specify a different output channel.

Modification of Application Filing Window Procedures

4. *Background.* A brief history of the processing problems that have confronted this service from its inception is necessary. The

[1] *See* Section 74.732(e) of the Commission's Rules.

[2] Only 20 percent of the low power television construction permits authorized between November 1983 and May 1985 are now licensed to operate in the service. 71 construction permits issued during this period have expired and have been cancelled by the Bureau. However, we note that the time allowed to construct was recently lengthened from 12 months to 18 months. Therefore, approximately two-thirds of the low power television construction permits granted between January and May 1985 have not yet been licensed.

low power television service was first contemplated in a *Notice of Inquiry*, 68 FCC 2d 1525 (1978). In September 1980, we proposed rules for the new service and established procedures for accepting and processing low power television and television translator applications until the conclusion of the rule making. *Notice of Proposed Rule Making in BC Docket No. 78-253*, 82 FCC 2d 47 (1980); *Interim Processing Order*, 48 RR 2d 291 (1980). The service used the "cut-off" processing procedures in which applications are announced on public notice as acceptable for filing and a final 30-day period is given for the filing of competing applications. Approximately 5,000 applications were received by April 1981. Due to the lack of processing resources, on April 9, 1981, we ordered a partial freeze on the filing of applications with limited exceptions for those which proposed stations for areas not served or underserved by full service television. *Order Imposing Freeze*, 49 RR 2d 433 (1981). Despite this partial freeze, the application backlog increased to 6,500 by mid-1982. When the final rules for the service were adopted in *Report and Order in BC Docket No. 78-253*, 51 RR 2d 476 (1982) (hereinafter "*LPTV Report and Order*"), the partial freeze was continued on all but the most rural applications. Applicants could, however, continue to file against any application announced on a cut-off list as acceptable, whether that cut-off application was for a rural or urban area.

5. Even with the partial freeze, the application backlog increased to 12,000 by the fall of 1983. Consequently, on September 15, 1983, we instituted a "total" freeze on the filing of new low power television or television translator applications and those applications proposing major changes in authorized facilities. *Order*, FCC 83-423, released September 19, 1983. Under this freeze, applications could be filed only if they were mutually exclusive with and timely filed against applications announced on public notice cut-off lists as acceptable. The only exceptions were for existing stations on Channels 70 through 83 that had to move to a lower channel due to land mobile radio interference considerations or for existing stations that were forced to modify their operations due to interference problems involving full-service television stations. However, the freeze did not accomplish its intended objective, for tremendous numbers of applications were filed against cut-off lists. The number of pending applications burgeoned to approximately 37,000 by March 8, 1984, the last day for filing applications against a cut-off list of 34,000

acceptable applications. We then stopped issuing cut-off lists entirely.

6. We were mindful of the problems caused by the ever-increasing backlog, and in December 1983, three months after the "total" freeze went into effect, began a rule making proceeding to seek comment on a variety of proposals to streamline application processing. *Notice of Proposed Rule Making in MM Docket No. 83-1350*, FCC 83-593, released December 23, 1983, 49 Fed. Reg. 908, published January 6, 1984. We proposed, *inter alia*, to replace the cut-off lists with some form of filing window procedure. Generally, this procedure allows applications to be filed only during a specific period of time announced by public notice 30 days in advance. An acceptable application filed during a window is then proposed for grant, or, if mutually exclusive with other acceptable applications, grouped for lottery.

7. The filing window procedure was adopted for the low power television and television translator service in *Report and Order in MM Docket No. 83-1350,* 102 FCC 2d 295 (1984) (hereinafter *"Filing Windows"*). The new procedure was codified in Section 73.3572(f) of the Commission's Rules. We found that the cut-off list procedure was administratively inefficient since it effectively required double processing of all applications, once to determine acceptability and again to determine mutual exclusivity. The cut-off lists also served to generate a great number of competing applications, further delaying implementation of low power television service and expansion of television translator service. *Id.* at 297-8. We concluded that the use of filing windows in this service would allow all applications filed in a particular window to be more expeditiously proposed for grant or grouped for lottery. Moreover, we felt the filing window approach would help to prevent the practices of copying portions of acceptable applications and manufacturing daisy chains of applications directly and indirectly mutually exclusive with a cut-off application. These practices have been responsible in large part for the constant application backlog.

8. We also invited comments in the rule making, *inter alia*, as to whether low power television and television translator filing windows could be limited by geographic area or channel. We perceived the possibility of unfairness to applicants if windows were opened only for specific states, regions and/or channels since the filing or grant of an application in one region or on one channel could preclude completely the later filing of another application for an adjacent community or channel outside the

parameters of that window. At that time, we concluded that no plan proposed for limiting the size or scope of a given window adequately resolved this issue. Consequently, we stated that:

> In certain areas such as Alaska, Hawaii, Puerto Rico, Guam, or the Virgin Islands, physical distance may allow for separate windows. However, except in isolated situations where it is apparent that no prejudice will occur to adjacent areas, we will open the filing windows for all available channels throughout all of the country.

Filing Windows, 102 FCC 2d at 300. A filing window was opened in Alaska between June 3 and 17, 1985, and for the most part those applications have been processed. However, no filing windows have yet been opened for the lower 48 states.

9. Our staff has made substantial progress in the sizable task of processing the approximately 37,000 applications that were pending in March 1984, following our last cut-off list. The application backlog now stands at less than 14,000, and nearly all acceptable applications will appear in lotteries or be proposed for grant within the next year. From this experience, however, it is clear that if another 25,000 applications (the number filed against the last cut-off list) were filed during an unrestricted nationwide window, it would take an additional two years to process them completely. Such a large influx of applications at one time would again cripple processing, for all staff resources would have to be directed toward ministerial tasks such as assigning file numbers and conducting preliminary reviews to ensure that each application is complete and its information is consistent and sufficient for processing. In view of this agency's tightened budget projections, there will be no opportunity to hire temporary employees or authorize overtime hours, as has been the case in the past when large numbers of applications were received at once. Further, our remaining computer capacity is limited, and the purchase of additional computer hardware resources would be extremely unlikely at this time. It would be far more efficient for the Commission to control the number of applications received at any one point in time so that the detailed processing of applications for lottery and grant could be handled within our resource limitations.

10. Moreover, the various application filing freezes which have been necessary to process the constant backlog have had a deleterious effect on the establishment of low power television service and on the expansion of television translator service. The sheer number of applications to be processed and evaluated for predicted interference has meant that it has been years, in some

cases, between the time an application was filed and the time in which it was proposed for grant or grouped for lottery. In that time, funding arranged when the application was filed may have become unavailable or restricted. In the case of communities seeking television translators to rebroadcast commercial or public television stations, NTIA/PTFP grants and funding from local television tax districts have been deferred for years, wasting the resources of both applicants and the government. Additionally, the filing freeze has hampered greatly low power television and television translator permittees and licensees who seek permission to modify their facilities due to technical problems (lost transmitter sites, etc.) or a desire to improve service to their communities. In this service, applications for major changes in authorized facilities are processed together with new applications. A proposed increase in predicted coverage by an authorized station in any direction is classified as a major change in facilities.[3] Consequently, low power television and television translator permittees and licensees have largely been unable to file these applications for years.[4] Finally, full service television licensees have been thwarted in their efforts to apply for television translators to fill in their coverage in shadowed areas.

11. *Proposals.* In light of the problems for the Commission, for station owners, and for present and future applicants which would likely result if the application flow cannot be better managed, it is imperative to examine whether the present unrestricted nationwide filing window procedure can be modified. We propose below specific alternatives to accomplish this objective.

12. One approach, which was not contemplated by commenters in the 1984 rule making, is that of a limit or "cap" on the number of new applications that could be filed by an applicant during any particular window. This cap could be as little as one application per window, or as much as, for example, twelve applications per window or more. Comments are solicited on whether the cap should be the same number for each window or whether it could be varied from window to window as processing resources dictate. We do not, however, propose a cap on major change applications filed by low power television or television translator permittees or licensees. Also, the number of an applicant's presently pending

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[3] *See* Section 73.3572(a)(1) of the Commission's Rules.

[4] Freeze exemptions exist for authorized stations that have interference problems with full service television stations or with land mobile radio operations. *See* para. 5, *supra.*

applications would not count toward the limit that could be filed by the applicant in a given window.[5]

13. By imposing a cap on the number of applications for new stations that could be filed by a particular applicant, the nationwide, nonpreferential character of the filing window procedure would be retained. Moreover, prejudice to applicants, if any, would be minimal. Reference to our application data base suggests that at least 75% of low power television and television translator applications have been filed by 10% of all applicants; conversely, 80% of all applicants have filed five or fewer applications. Consequently, if a restrictive cap of five applications per window was used, for example, few applicants would be even temporarily unable to file their applications. We stress that the application cap would be applicable only to each window opened. Once we completed initial identification of mutually exclusive groups and singletons (applications not mutually exclusive with any other) filed during one window, and began announcing lottery groups and proposing grants, we could promptly open another window. Applicants filing in that subsequent window could then, if necessary, tailor their proposals to avoid interference to earlier filed acceptable applications. This would further lessen the daisy chain effect and expedite new service. More frequent windows would also allow major change applications by permittees and licensees to be filed a relatively short time after modification of their facilities becomes necessary or desirable.

14. One consequence of limiting the number of applications that could be filed in a given window is that some applicants might attempt to circumvent the limit by filing applications under different business names. As a result, we must have some method of enforcing the application cap. We thus propose, if the cap is adopted, to amend the low power television and television translator construction permit application form (FCC Form 346) to require an appropriate certification or the names, addresses and occupations of every party to an application and their percentage of ownership interests in the applicant and in other pending low power television and television translator applications. That additional information, together with Section 73.3521 of the Rules, which forbids directly mutually exclusive low power television and television translator applications filed by the same

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[5] We reiterate that there will be no change in the treatment of currently pending applications. As we have stated previously, pending applications will be "cut-off" as of the date of the first applicable filing window. *Filing Windows*, *supra*, at 298.

applicant or the same principal of two different applicants,[6] should assist in deterring misrepresentation and abuse of our processes by over-filing applicants. Comments are requested on the type and extent of party-in-interest information that would best effectuate this purpose.

15. We also propose to reexamine the question of whether the geographic area of a filing window could be restricted so that windows could be opened by state(s) or portions of state(s), by regions composed of contiguous or non-contiguous states, or by regions defined by other means (such as by latitude and longitude). If we limited application filing to a small area or areas at any one time, we could better adjust our administrative processes to maintain even greater control over application flow and process applications to grant even faster. Comments are requested on state or regional approaches that would best achieve these results. Commenters suggesting a regional approach should address the method of how regions may be divided. Also, views are solicited as to the method by which states or regions could be selected for processing. For example, the order of the designation of particular states or regions for processing could be accomplished through a lottery process. Commenters may also address the feasibility of some combination of the cap and the state or regional approaches.

16. We have previously perceived legal impediments to state or regional filing windows. We concluded in the 1984 rule making that the unallocated nature of the low power television and television translator service and the contour overlap predicted interference standard used in the service effectively precluded limiting the size of a filing window in the lower 48 states. *See* para. 8, *supra*. This conclusion was based on the view that state or regional filing windows may contravene the *Ashbacker* doctrine[7] because applications filed in one window for a given state

[6] Section 73.3521 of the Commission's Rules provides:

> When there is a pending application for a new low power television or television translator station, or for major changes in an existing station, no other application which would be directly mutually exclusive with the pending application may be filed by the same applicant or by any applicant in which any individual in common with the pending application has any interest, direct or indirect, except that interests of less than 1% will not be considered.

Sections 73.3555 and 73.3615 of the Rules, which restrict multiple ownership of AM radio, FM radio, and full service TV stations, and codify the attribution benchmarks, respectively, do not apply to the low power television and television translator service.

[7] *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), holds that applicants whose proposals are mutually exclusive, as defined by Commission

or region could permanently prevent prospective applicants from applying for conflicting facilities outside that state or region in a later window. However, we believe that this earlier interpretation of *Ashbacker* may have been too expansive in its application to prospective applicants. We note, for example, the recent statement of the United States Court of Appeals for the District of Columbia Circuit that "*Ashbacker's* teaching applies not to prospective applicants, but *only to parties whose applications have been declared mutually exclusive.*" *Reuters Ltd. V. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986), *rehearing denied*, F.2d (1986) (emphasis in original).[8] Therefore, we invite comment on the *Ashbacker* issue as it relates to this approach.

Displacement of Low Power Television and Television Translator Stations

17. *Background.* The television translator service was authorized originally to operate on UHF channels 70 through 83. However, those channels were reallocated from broadcast to land mobile use in 1970. *Spectrum Space for Land Mobile Services*, 19 RR 2d 1663 (1970). Television translators were then allowed to operate on any VHF or UHF channel below channel 70. Shortly thereafter, we decided that television translators operating on channels 70 through 83 would be afforded protection from land mobile services only for the balance of their existing license terms, after which renewals would be granted only on a secondary basis. Licensees were cautioned to be aware of their secondary status and of the possibility that they may be forced to move to a lower channel. *Amendment of Part 74, Subpart G (Television Broadcast Translator Stations)*, 23 RR 2d 1504 (1971). Fifteen years later, approximately 600 television translator stations remain in operation on channels 70 through 83.

18. Television translators have always been considered secondary to full service television stations in spectrum priority. This secondary status was continued when the low power television service was instituted. Section 74.702(b) of the Commission's Rules now provides that a low power television or television translator station which actually causes interference to the reception of a full service television station must either eliminate that interference or cease operation on that channel.

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rules, are entitled to comparative consideration of their applications.

[8] *Reuters* reversed a Commission decision which affirmed the Private Radio Bureau's recission of microwave radio licenses so that late-filed applications might compete for the license.

19. There is no guaranteed right or expectancy that a low power television or television translator station displaced by the land mobile radio service or by a full service television station may operate on another vacant channel. In such a situation, the permittee or licensee may file immediately an application to seek authorization on a channel on which the station will not cause interference. Such applications are freeze-exempt. *See* para. 3, *supra*. An application of this kind would be considered as one for a major change in facilities under Section 73.3572(a)(1) of the Commission's Rules.[9] Since new and major change applications are processed together, an application to change channel would not be considered as "cut-off," or safe from competing applications, until the close of the first relevant filing window period. In the interim, the displaced station could operate on its new channel under special temporary authority (STA). However, filing a major change application and receiving an STA may act to stimulate the filing of competing applications. The station may be forced eventually to surrender the channel if it cannot settle with its competitors, loses the resulting lottery, and its competitor builds the facility. At that point, the licensee or permittee of the displaced station may file yet another major change application (if another vacant channel is available), receive another STA, and begin the process over again.

20. We have been urged repeatedly to recognize this situation and modify our rules to permit displaced low power television and television translator stations to move to another channel without competition, most recently by the Community Broadcasters Association (hereinafter "CBA"), a low power television trade association. In our recent affirmance of the Mass Media Bureau's denial of a CBA rule making petition on this issue, we characterized CBA's argument thus:

> Displacement of LPTV licensees without recourse other than to enter into competition for various channels creates an uncertainty about retaining licensee status that discourages long-term investment, potentially resulting in a succession of short-term rather than experienced, proven and financially consolidated licensees... [T]he displacement problem [leads to]...haphazard, random and continuing restructuring of the LPTV industry, with inferior service the allegedly inevitable result.

In re Petition by Community Broadcasters Association to Amend Part 74 of the Commission's Rules, FCC 86-72, released February

[9] Section 73.3572(a)(1) provides in pertinent part:

"In the case of low power TV and TV translator stations . . . , a major change is any change in: (i) Frequency (output channel) assignment . . . ."

11, 1986, at para. 3. CBA suggested that where there is a displaced station and applicants for available channels in the same area, the displaced station could be granted a right of automatic continuation of operation on one available channel only if there is a second available channel for which other applicants on the channel sought by the displaced station might apply. We rejected CBA's proposal, noting the low power television and television translator service is a secondary service, and investors in these stations have been on clear notice that operation of this kind of station entails the risk of displacement. *Id.* at para. 4. Further, we found that CBA's proposal was technically unworkable. It would be difficult to determine which pending applicants would have to change channels so that one channel could be freed for use by the displaced station. Additionally, it would force many of those pending applicants to re-engineer their proposals. These revised proposals could have a seriously adverse impact on existing daisy chains, forcing massive reprocessing of applications and further delaying the implementation of service. *Id.* at para. 5.

21. *Proposal.* We have stated that while "it is not the Commission's role to maintain an existing service in perpetuity," our "proper concern in these [displacement] situations is that service be provided to the public." Second Report and Order in General Docket No. 81-768, 93 FCC 2d 952, 983 (1983). We have no intention of upgrading the low power television and television translator service from its secondary status. Nevertheless, we do not wish to preserve rules or policies that result in *diminishing overall television service* to the public. We are concerned that the displacement of low power television and television translator stations will eventually result in fewer stations, thus lessening the viewing choices available to the public. Therefore, we invite comment on a proposal to allow modification of the permit or license of a displaced low power television or television translator station to specify operation on a new channel. This modification could be accomplished, for example, under Section 316(a) of the Communications Act of 1934, as amended;[10] under the public

[10] As we have stated,

> Section 316 of the Act contains statutory authority for the Commission to modify a station's license if, in the Commission's determination, such action furthers the public interest, convenience and necessity. Section 316 has been used in numerous instances in response to licensee requests for modifications of licenses to specify different channels. The Commission's ability to act in the public interest does not depend upon who requested Commission action or upon who brought to our attention the information on which we base our determination.

interest standard of Section 309(a) of the Act; or by amendment of Section 73.3572 of the Rules to make an application of this kind a minor change in facilities. To avoid the complexity and strain on the Commission's processes that led us to reject the CBA scheme, we would modify a license or permit only when the licensee or permittee submits an acceptable major change application which specifies a new channel which is not mutually exclusive with any other pending low power television or television translator stations. The permittee or licensee must demonstrate that the proposed change is necessary to avoid predicted interference to land mobile radio operations or to an authorized full service television station as defined by Sections 74.705 and 74.709 of our Rules. Further, the application may not propose a significant change in the station's service area (*e.g.*, restricting antenna site moves to less than 10 miles). By defining this special modification in this way, we would ensure that easy reference to our data base can be made to determine whether there are other pending applications on the new channel and whether the permittee or licensee can operate on that channel without causing interference to other authorized stations.[11]

Administrative Matters

22. Authority for this proposed rule making is contained in Sections 1, 3, 4(i) and (j), 303, 308, 309 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before September 2, 1986, and reply comments on or before September 17, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating

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In the Matter of Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations, FCC 86-117, released March 21, 1986, at para. 25.

[11] On March 11, 1986, AGK Communications, Inc. ("AGK") petitioned for reconsideration of our denial of the CBA rule making petition noted noted above. Subsequently, pleadings styled "Comments in Support of Petition for Reconsideration" were filed by CBA and by Bogner Broadcast Equipment Corporation. A "Petition for Rule Making" on this issue was also filed by Sandra A. Engle. Since we are here seeking comment on a procedure to provide relief for displaced low power television and television translator permittees and licensees, these petitions and comments will be considered as comments in this proceeding and accordingly reviewed. Therefore, they are hereby dismissed.

the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order.*

23. For purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceedings must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. Section 1.1231.

24. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

25. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

26. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

27. For further information on this proceeding, contact Terry L. Haines, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

Initial Regulatory Flexibility Analysis

I. *Reason for Action*

In this proceeding, we seek to develop a record and to elicit comments on proposed rules relating to application filing procedures and displacement of stations in the low power television and television translator service.

II. *Objective*

The proposed rules are designed to speed application processing and to eliminate rules which may diminish overall television service to the public. The proceeding will elicit comments on the public interest benefits and costs of the proposed rule changes in accordance with fulfilling the mandate of Section 308(b) of the Communications Act of 1934, as amended.

III. *Legal Basis*

The legal basis for eliciting comments on these proposals to change our rules is found in Sections 4 and 303 of the Communications Act.

IV. *Description, Potential Impact, and Number of Small Facilities Affected*

The overall time and costs involved in proceedings concerning parties seeking authorizations for new low power television or television translator stations would be reduced. However, the time to complete the initial application form may

increase slightly due to the proposed collection of ownership information from the applicant.

V. *Recording, Record Keeping and Other Compliance Requirements*

There is no additional impact.

VI. *Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules*

There is no overlap, duplication or conflict.

VII. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives*

Common Carrier, Rates, Just and Reasonable Charges
Complaint, Common Carrier
Tariff, Just and Reasonable Charges

Complaint filed by MCI alleging that AT&T has violated Sections 201(b) and 202(a) of Communications Act in connection with AT&T's offering of its "Block-of-Time Calling Plan" as set forth in Section 3.2.1 of its Tariff F.C.C. No. 1 denied. Commission concluded that MCI has failed to meet its burden of proof in sustaining its charge that Block-of-Time is unlawful.

—*MCI Telecommunications Corp.*

FCC 86-300

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
MCI TELECOMMUNICATIONS CORPORATION, Complainant,	
v.	File No. E-85-11
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendant.	

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1986; Released: July 2, 1986

BY THE COMMISSION:

1. Before the Commission is a complaint filed by MCI Telecommunications Corporation (MCI) on February 20, 1985, pursuant to Section 208 of the Communications Act (Act).[1] MCI contends that the American Telephone and Telegraph Company (AT&T) has

[1] 47 U.S.C. § 208.

violated Sections 201(b) and 202(a) of the Act[2] in connection with AT&T's offering of its "Block-of-Time Calling Plan" (BOT) as set forth in Section 3.2.1 of its Tariff F.C.C. No. 1. MCI contends that the rates for the Block-of-Time offering, which AT&T markets under the designation "Reach Out America," do not recover AT&T's cost of providing the service, and therefore are contrary to the Commission's goals of cost-based pricing and fostering fair competition as well as to the requirement of Section 201(b) of the Act to maintain just and reasonable charges for interstate common carrier telecommunications service. MCI also contends that in offering BOT at different rates from what it charges for ordinary message telephone service (MTS), AT&T is violating the prohibition in Section 202(a) against unreasonable discrimination in charges for like services. MCI therefore urges us to order AT&T to cease and desist from offering BOT, to remove the pertinent provisions from its interstate MTS tariff and to grant such other relief as may be appropriate.[3] MCI has failed to produce any evidence to support its complaint. For this and other reasons stated below, the complaint in denied.

I. BACKGROUND

2. Following its experimental offering of optional calling plans to customers in several states during 1983, AT&T filed revisions to its MTS tariff in April 1984 to introduce BOT as a nationwide offering.[4] The Block-of-Time Plan offers customers two service options. Under Option A, a customer is afforded one hour of interstate dial station calling per month in the night/weekend rate period[5] for a current fixed monthly charge of $9.45. Under Option B, customers pay a monthly recurring charge of $10.85 for a sixty-minute allotment of night/weekend calling plus a 15 percent discount for dial station calling during the evening rate period.[6] Under both options, night/weekend calling in excess of one hour is

[2] 47 U.S.C. §§ 201(b), 202(a).

[3] MCI asserts in its complaint that it intends to seek an award of damages by supplemental complaint should the Commission determine here that AT&T has committed the violations charged.

[4] AT&T's Optional Calling Plan experiment (including the Block-of-Time Plan) was authorized by Commission order, AT&T Co., Revisions to Tariff FCC No. 263 MTS, Transmittal No. 14251, 94 FCC 2d 551 (1983), and was conducted during the last six months of 1983 in California, New York, and Iowa.

[5] The night rate period includes the hours between 11:00 p.m. and 8:00 a.m. the following morning from Sunday through Thursday nights. The weekend rate period extends from Friday at 11:00 p.m. to Sunday at 5:00 p.m.

[6] The evening rate period includes the hours between 5:00 p.m. and 11:00 p.m. on weekdays and Sundays.

charged by the minute, *pro rate*, at the hourly rate of $8.25.[7] There is a $10.00 nonrecurring service order charge, which is waived for customers who subscribe to the offering within 90 days after it becomes available in their local exchange area. The features of BOT that chiefly distinguish it from AT&T's "basic" MTS offering are that BOT rates are fixed without regard to the distances between the terminal points of calls, and night/weekend charges are fixed without regard to usage except insofar as they exceed 60 minutes within a given billing period.

3. MCI and several other parties filed petitions to reject the proposed Block-of-Time tariff revisions. The Bureau denied the petitions, however, and the revisions became effective on June 7, 1984. In deciding that summary rejection was not warranted, the Bureau observed that the Block-of-Time Plan "appears to be a relatively simple, easy to understand billing system that many consumers would find useful" and that the results of the preceding experiments "appear to show" that customers who subscribe to BOT would increase their off-peak usage levels, which in turn may stimulate traffic and increase network efficiency. *AT&T Communications, Inc., Revisions to Tariffs F.C.C. No. 283 and F.C.C. No. 1.* Transmittal No. 79, Mimeo No. 4711 (released June 6, 1984).

4. MCI and six other parties filed applications for review of the Bureau's order, urging that the Block-of-Time Plan be rejected because the rates were too low. The Commission denied the applications for review and affirmed the Bureau's decision permitting the tariff revisions to take effect. *AT&T Communications, Inc., Revisions to Tariffs F.C.C. No. 263 and F.C.C. No. 1*, FCC 84-563 (released Dec. 31, 1984). Inasmuch as the initial-hour BOT

[7] As originally filed, the BOT rates were slightly higher; the charges for Option A, Option B, and night/weekend calling beyond 60 minutes were $10.00, $11.50 and $8.75, respectively. The reduction of approximately 6 percent in the rates for Block-of-Time resulted from the Commission's subsequent requirement that all AT&T rates be reduced to reflect the flow through of carrier common line pool reductions occasioned by the institution of the $1.00 end user subscriber line charge. MTS and WATS Market Structure, CC Docket Nos 78-72 and 80-286, FCC 85-71 (released Feb. 26, 1985). The reduction in Block-of-Time rates, in addition to other rate reductions, was permitted to go into effect on July 2, 1985. *See* AT&T Communications, Tariff F.C.C. Nos. 1 and 2, Transmittal No. 358, Mimeo No. 6186 (released Aug. 7, 1985). On April 24, 1986, AT&T filed proposed rate reductions of 2.7% for Option A and 11% for Option B. *See* AT&T Communications, Revisions to Tariff F.C.C. Nos. 1 & 2, Transmittal No. 604 (filed Apr. 24, 1986). Nothing in this Order is intended to address these proposed revisions. We note that on June 1, 1986, subsequent to the close of the record, the following rates went into effect: Option A, $8.95, Option B, $10.15, and night/weekend calling beyond 60 minutes, $7.80.

rate seemed commensurate with average current night/weekend MTS rates, the Commission concluded that AT&T's offering of BOT would not adversely affect competing providers of switched message services. The Commission further concluded that rejection was not shown to be warranted on the ground that BOT is unlawfully discriminatory because BOT was a generally available offering. Among other things, the Commission noted that while BOT rates might not fully recover "out-of-pocket" access charge expense, the same may be true of AT&T's ordinary night/weekend MTS rates for calls spanning distances of less than 1910 miles.[8] The Commission acknowledged concern as to whether the plan would prove fully compensatory and as to the possibility that a proliferation of optional MTS calling plans might engender confusion among customers. The Commission accordingly noted that it had recently instituted a proceeding to consider "overall questions related to optional calling plans." *Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans*, CC Docket No. 84-1235, 50 Fed. Reg. 1881 (January 14, 1985), *Report and Order adopted*, 50 Fed. Reg. 42,945 (Oct. 23, 1985), *recon. pending (OCP Guidlines Order)*.

5. MCI filed the instant complaint on February 20, 1985, contending, as noted before, that the BOT rates are unjust and unreasonable in violation of Section 201(b) of the Act, that the plan is unreasonably discriminatory in violation of Section 202(a) of the Act, and that the plan violates the Commission's competitive policies. Concerning the issue of cost recovery, MCI first pointed out that the then-effective[9] first-hour rate of $10.00 for Option A would produce revenue of 16.67 cents per minute, assuming that subscribers were to make full use of their sixty-minute calling allotment, and that the then-effective rate for calling in excess of sixty minutes would produce revenues of 14.58 cents per minute.[10] Next, it alleged that AT&T paid exchange carriers on average 17.94 cents per conversation minute for switched access. Thus, it asserted, BOT plainly does not recover the out-of-pocket access expense that AT&T incurs in providing it, and certainly does not recover the total cost of the service.

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[8] Ordinary MTS per-minute rates vary incrementally by calling distance based on a series of "mileage bands." The highest band is 4251 miles or greater.

[9] That is, BOT rates as originally filed. *See* note 7, *supra*.

[10] Under current rates, Option A produces revenue of 15.75 cents per minute for the first hour of service, while Option B provides revenue of 18.08 cents per minute during this time period. Additional minutes under both options are charged at the pro rata rate of $8.25 per hour or 13.75 cents per minute.

6. In its Answer, AT&T contended that MCI's allegation of below-cost pricing was derived from a false and simplistic assessment of costs and revenues. It asserted that MCI's assessment of per-minute revenue was mistaken because it failed to take into account the effect of post-purchase changes in customer usage patterns, revenues from Option B, and the fact that some BOT customers use less than their full initial calling allotments. AT&T stated that it had conducted a tracking study which indicated that BOT as a whole contributed 27.7 cents per minute of incremental revenue, substantially in excess of its then-effective access charges. Further, AT&T asserted that "out-of-pocket" access charge expense is not a true measure of the access cost for BOT over any significant time span. It maintained that the marginal access cost of stimulated BOT minutes-of-use is much less than the out-of-pocket access cost because the stimulated usage does not increase the exchange carriers' collective non-traffic sensitive (NTS) revenue requirements,[11] but rather results in lower per-minute switched access rates for both AT&T and all other interexchange carriers.

7. At the request of the Common Carrier Bureau, AT&T submitted evidence in the form of verified witness statements on September 30, 1985, and October 15, 1985, to support its claims of financial viability of the service. MCI received a similar request but declined to submit evidence, stating that it wished to proceed to final briefing. MCI filed a brief on December 4, 1985. AT&T filed a final brief and rebuttal on January 10, 1986, and MCI filed a reply on January 24, 1986. AT&T also filed a response on February 10, with a motion to accept the unauthorized pleading, to which MCI replied on February 21.[12]

II. SUMMARY OF THE EVIDENCE

8. AT&T has submitted estimates of revenues and costs for BOT in its first year of operation ("year one") and projections of costs and revenues for the second and third years of the offering. It predicates the estimates and projections on the results of a tracking study it conducted during the first six months of BOT's operation as a means of ascertaining, among other things, the

[11] That is, the cost to AT&T, including cost of capital, of providing switched access by means of non-traffic-sensitive (NTS) plant. The principal component of NTS plant cost is the cost of connections between customers' premises and telephone-company switching offices.

[12] We have entertained both of these unauthorized filings because it does not appear that either party has been prejudiced by our consideration of these pleadings.

extent to which the offering was stimulating demand. The study recorded the MTS minutes-of-use (MOU) per month of some thirty thousand BOT subscribers and a similar number of non-subscribers with similar usage patterns in three states. The usage patterns of non-subscribers served as a "control" to indicate the extent to which variations in demand were attributable to factors other than stimulation from BOT rates. The results of the study indicate that BOT customers increased their MTS usage on average by 33.67 MOU per month. The study indicates that BOT generated $9.32 of additional revenue per subscriber per month in year one. *See* AT&T Answer, Affidavit of H. E. Harvey, Jr. at 3–4 (Mar. 29, 1985).[13]

9. AT&T used the results of the tracking study and the actual number of subscribers during each month of year one to compute BOT revenue stimulation for each month. These revenues were then totalled, and revenues from nonrecurring service order charges were added to derive total additional revenues from BOT of $80,687,000 for the year, after allowance for uncollectibles. *See* Statement of Roscitt at para. 3 (Oct. 15, 1985). The only significant items of additional expense generated by BOT in year one, by AT&T's account, were commercial and marketing expenses of $55,975,000 and marginal access charge expense of $49,007,000.[14] *See* Statement of Dennis E. Nelson (Oct. 15, 1985). Together, these two items comprise the majority of reported expenses for BOT in year one. *See* Appendix B, *infra*. In developing its estimate of access charge expense attributable to BOT for year one, AT&T first calculated marginal traffic-sensitive access expense for that period by multiplying the average traffic-sensitive charge per access minute times the number of "access minutes" that it deemed to have been newly stimulated by BOT in year one.[15] It then calculated the additional NTS access expense for BOT in year one by multiplying the various Carrier Common Line rates that were in effect at different times during year one by the number of access minutes that BOT

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[13] Affiant Harvey's results are reproduced in Appendix A, herein. These figures differ slightly from those provided by AT&T in its Statement of Richard R. Roscitt dated September 30, 1985. These differences are insignificant.

[14] This figure appears to include Billing and Collection costs of $1,636,000. Adjusting for this, access charge expense would be $47,371,000. *See* Statement of Charles E. Link, figs. 1 & 2 (Oct. 15, 1985).

[15] BOT demand stimulation for year one was converted from "conversation minutes of use" to "access minutes" by applying a conversion factor of 2.068754 to actual conversation minutes stimulated in year one. *See* Statement of Link (Oct. 15, 1985).

stimulated in each period and summing the products. Total marginal expense for BOT in year one, by AT&T's report, amounted to $108,319,000. Thus, the net result of BOT's operation in year one, by AT&T's estimation, was to diminish switched service pre-tax earnings by $27,632,000,[16] which translated into an after-tax loss of $13,117,000.[17]

10. AT&T's estimates of marginal earnings for BOT in year two (July 1, 1985, through June 30, 1986) and year three (July 1, 1986 through June 30, 1987) are based on projections.[18] AT&T posits alternate results for each of those two years, predicated on alternative "growth" and "no-growth" hypotheses. Under the "no-growth" hypothesis it is assumed that AT&T will expend nothing further to promote BOT after the end of year one and that no new BOT subscribers will be attracted thereafter. Hence, AT&T projects that BOT's "Commerical and Marketing" expense—the largest single item of marginal expense in year one—would be reduced to almost nothing. The indicated "Commercial and Marketing" expense under this hypothesis only $1.4 million for year two and $0.8 million for year three, as compared with the $56.0 million reported for year one. *See* Statement of Nelson, fig. 1 (Oct. 15, 1985. Correspondingly, it is assumed under the "no-growth" hypothesis that the number of existing BOT subscribers will decline during years two and three at the same rate subscribers cancelled in the first year. Under the "growth" hypothesis, on the other hand, it is assumed that AT&T will expend nearly as much to market BOT in years two and three as it did in year one and that new subscribers will be attracted at the rate that AT&T originally projected in the tariff filing for the plan.

11. AT&T developed its projections of marginal traffic-sensitive access charge expense for years two and three under the alternative "growth" and "no-growth" hypotheses in the same way as it developed its estimate of such expense for year one, by multiplying the average traffic-sensitive access cost per access minute[19] times the demand, in access minutes, that BOT would

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[16] $80,687,000 - $108,319,000 = ($27,632,000).

[17] *See* Statement of Nelson (Oct. 15, 1985).

[18] Although several months of year two had elapsed when AT&T submitted its September 30 and October 15, 1985 evidence, it stated that it had not been feasible prior to then to assess the data attributable to this time period.

[19] AT&T assumed that its average traffic-sensitive access cost per access minute would increase from 3.45 cents to 3.81 cents as of October 1, 1985, and would remain at that amount through the end of year three. *See* Statement of Link at para. 5 (Oct. 15, 1985).

ostensibly stimulate in years two and three under each hypothesis. In predicting BOT demand in years two and three, AT&T again assumed that there would be an average per-subscriber stimulation of 33.67 MOU per month over their base usage; then, consistent with the method that it used to estimate demand stimulation for year one, it multiplied 33.67 times the projected number of BOT subscribers in each month of years two and three, summed the products, and expressed the result in terms of access minutes by applying to conversation MOU the weighted national average conversion factor of 2.066231, based on NECA's access tariff filing of July 2, 1985. *See* Statement of Link (Oct. 15, 1985). Similarly, AT&T predicated its estimates of additional revenue attributable to BOT under both hypotheses for years two and three on the assumption that each BOT subscriber would, on average, contribute the same revenue in each month that was earned during the first half of year one.[20]

12. AT&T affiants made projections of NTS access expense for BOT in years two and three under the alternative "growth" and "no-growth" hypothesis and credited BOT access expense with the savings realized from the demand stimulation it created. This savings is the difference between fully allocated access expense and AT&T's marginal access expense. In sum, AT&T maintains that minutes stimulated by BOT lower the overall access charge rate per minute calculated by NECA, and that this marginal savings should offset access costs associated with provision of the service. On the basis of its calculations, it projects traffic and non-traffic sensitive access charges for BOT in the amount of $51,318,000 in year two and $39,002,000 in year three under its "no-growth" hypothesis, while under its "growth" hypothesis, these charges would be $90,806,000 and $117,901,000, respectively.[21] This may be compared with actual BOT access expense in year one of $47,371,000. *See* para. 9 & n.14, *supra*.

13. The "bottom line" AT&T projects for BOT in year two is that the service would generate net marginal after-tax earnings of $21,517,000 under the "no-growth hypothesis and $19,230,000 under the "growth" hypothesis. It projects net marginal after-tax

[20] AT&T's Director of Consumer Program Management, Mr. Roscitt, indicated that the projected average monthly marginal revenue per subscriber was adjusted on the assumption that the BOT rate would be reduced in June 1986 pursuant to "flow through" of the proposed $1.00 increase in residential and single-line business end-user common-line access charges to $2.00 per month. Statement of Roscitt (Oct. 15, 1985).

[21] For a complete description of these calculations, see Statement of Link at para. 9 (Oct. 15, 1985).

earnings from BOT of $20,922,000 and $47,209,000, respectively, under the "no-growth" and "growth" hypotheses in year three. *See* Statement of Nelson, figs. 1 & 2 (Oct. 15, 1985). Thus, under either the "growth" or "no-growth" hypothesis, AT&T predicts that the first year loss would be recouped before the end of year two.

III. DISCUSSION

A. Standard of Review

14. The Commission recently adopted guidelines for reviewing tariff filings by dominant carriers, such as AT&T, offering "Optional Calling Plans" (OCPs), *i.e.*, "supplemental or additional MTS offering[s] under alternative, non-traditional pricing mechanism[s]." *OCP Guidelines Order, supra.* The parties to this proceeding disagree as to what bearing, if any, the determinations reached in the *OCP Guidelines Order* have on the matters at issue here. AT&T contends, in essence, that the standard which the *OCP Guidelines Order* delineates for tariff review also should be applied in resolving controversies as to the lawfulness of OCPs that have been raised by complaint. MCI responds that the guidelines are only to be applied in making nonfinal determinations to permit tariffs to take effect or to suspend tariff filings, because the guidelines were not devised to supplant "the more definitive ratemaking standards" on which complaints must be decided.

15. MCI is mistaken in contending that the *OCP Guidelines Order* is irrelevant. Our holding in the *OCP Guidelines Order* has a substantial bearing on complaint determinations concerning the lawfulness of OCPs, notwithstanding that our primary concern there was to devise a standard for initial tariff review. Although summary decisions to accept, suspend, or investigate tariff filings are not final determinations of lawfulness under the Communications Act,[22] the same statutory requirements are considered in analyzing the tariff filing. Thus, in developing general criteria on which to review OCP tariff proposals, of paramount importance was that application of the guidelines would satisfy the requirements of Sections 201(b) and 202(a). It would be illogical for us to disregard the conclusions reached in the *OCP Guidelines Order* solely because the issues raised are in the context of a complaint since the same basic issues are presented in both contexts. Of

[22] Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1979), *cert. denied*, 451 U.S. 920 (1981).

course, it should be recognized that the *OCP Guidelines Order* left dominant carriers the option to justify a particular plan on some basis other than the guidelines. Contrary to MCI's argument, however, nothing in the *OCP Guidelines Order* would prevent the Commission from using the standards set forth therein to analyze an offering which is claimed to be illegal in a Section 208 complaint.[23] AT&T has attempted to justify BOT on the basis of the *OCP Guidelines Order*, and we will analyze the issues raised by the complaint on those guidelines.[24]

16. We concluded in the *OCP Guidelines Order* that a standard more closely approximating marginal or incremental cost should be used instead of a "fully-distributed cost" (FDC) standard as a means of determining the reasonableness of OCP rates. Use of an FDC standard for this purpose could distort the development of competition and ultimately harm consumers by impairing the efforts of carriers to compete on a fair basis. We determined that allowing dominant carriers to price OCPs in closer correlation with marginal costs would foster increased and more efficient utilization of the telecommunications network and would be beneficial to customers of the carrier's other switched services to the extent that the OCPs were to contribute net revenue to recover common costs. We found no merit in commenter's contentions that OCPs must cover FDC costs to prevent AT&T from cross-subsidizing. We also concluded that it would not be unreasonable for an OCP to offer postalized or multipart rates. Therefore, if BOT contributes incrementally to AT&T's "net revenues" for switched services, there is strong evidence that BOT does not violate Section 201(b).[25]

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[23] Although it is possible that an OCP could be found to be unreasonable or discriminatory despite being in compliance with OCP guidelines, a party attacking an OCP which has met the guidelines necessarily bears a significant burden of proving the tariff is unlawful.

[24] We note, however, that petitions for reconsideration of that Order are still pending and nothing in this Order is intended to prejudice the outcome of our reconsideration of the *OCP Guidelines Order*. If we do make changes on reconsideration, parties will have the opportunity to request that we reevaluate AT&T's BOT offering.

[25] The *OCT Guidelines Order* sets forth a standard which is prospective in nature. The guidelines provided that initial losses engendered by an OCP should be recouped within three years from the effective data of the offer and that the proposed OCP be projected to increase net revenue within twelve months after the effective date of any revisions which reflect the projected stimulation due to the OCP. Our chief concern in promulgating time frames for profitability was to protect customers of other switched services from bearing additional costs that would not be offset reasonably soon. Insofar as the OCP is contributing to net revenues currently and is projected to do so for the foreseeable future, cancellation of the OCP tariff would be detrimental to other

B. Section 202(a)

17. MCI argues that BOT is unreasonably discriminatory in violation of Section 202(a) in that the charges under the BOT billing arrangement within the MTS tariff are different from regular filed MTS tariff charges. It asserts that, because MTS and BOT are "like" services, the fact that such services are provided at different rates represents unlawful discrimination.[26] AT&T, on the other hand, asserts that the BOT rates are nondiscriminatory. It alleges that unlawful discrimination cannot be demonstrated merely by showing different pricing options within a category of service, where such rate options are generally available to all customers and are not restricted to particular customers or uses, are customer-neutral, and are rationally based. It claims that MCI's interpretation would preclude carriers from offering any optional calling plans because prices under such plans are always different from prices under the regular (*e.g.*, MTS) offering. It adds that the increased profitability resulting from BOT will benefit, and not discriminate against, MTS customers by reducing costs to all customers, thus causing basic MTS rates to be lower than otherwise possible.[27] We agree that no unjust discrimination has been demonstrated.

18. In the *OCP Guidelines Order*, we established standards for reviewing optional calling plans for MTS service, such as BOT, in order to allow dominant carriers increased pricing flexibility while ensuring just, reasonable, and nondiscriminatory rates for all customers. The guidelines stand for the proposition that such carriers could, without violating the prohibitions of Sections 201(b) and 202(a) of the Act against unjust or unreasonable charges and unreasonable discrimination, provide alternative, non-traditional MTS pricing mechanisms (such as distance-insensitive rates), so long as these optional pricing plans conformed to the net revenue test adopted therein. *See OCP Guidelines Order, supra* at paras. 2-3[28]; *see also* note 25 *supra*. To find that the mere difference in charges under BOT and under

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ratepayers. If the contribution does not offset losses accumulated in the start-up phase, among other things, Section 207 of the Act, 47 U.S.C. § 207, contemplates monetary damages as an appropriate remedy.

[26] MCI Complaint at 14.

[27] AT&T Answer at 35-38.

[28] Compare, however, AT&T Communications, CC Docket No. 85-128, FCC 85-510, (released Sept. 30, 1985), where we rejected AT&T's Pro America 1 optional calling plan (*Pro 1*) on the basis that the potential cross-subsidization of *Pro 1* by other MTS ratepayers would constitute unreasonable discrimination in violation of Section 202(a).

basic MTS is unlawful discrimination, as MCI alleges, would negate the provision of any optional pricing. MCI has provided no evidence or argument to persuade us that BOT, which otherwise satisfies the guidelines, should be found in violation of Section 202(a).[29]

19. In sum, the BOT rates are in conformance with the requirements of Section 202(a) for the following reasons. BOT is available to all customers, it is their choice, not AT&T's; there is an overall contribution from BOT that benefits all MTS customers; and actual experience shows that the overall revenue per minute approximates ordinary night/weekend rates. Indeed, we note that under MCI's theory, no alternative billing arrangement under the OCP Guidelines would survive the allegation of discrimination.

C. Section 201(b)

20, MCI argues that BOT is not priced in accordance with associated costs, and is therefore violative of Section 201(b)'s prohibition against unreasonable rates.[30] As indicated in Section II, *supra*, AT&T's testimony shows a projected contribution of over $20 million per year in years two and three under its "no-growth" scenario and over $19 million in year two and $47 million in year three under its growth scenario, compared with the first year after-tax loss of $13.1 million. MCI argues that AT&T's projections are erroneous and that with appropriate corrections BOT will produce losses in all three years. We note that MCI

[29] In light of the *OCP Guidelines Order* permitting rate variations which comply with the guidelines, it is clear that price variations do not always amount to rate discrimination. Indeed, flexible pricing options are beneficial to both consumers and carriers and should be encouraged as a proper response to competition. While the general availability of an offering alone cannot guarantee that it is lawful (*see e.g.*, American Trucking Association v. FCC, 377 F.2d 121 (D.C. Cir. 1966)), *cert. denied*, 386 U.S. 943 (1966), we have permitted volume discount and other pricing options where they conform to specific guidelines. *See e.g.*, Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 947-948 (1984). Absent specific evidence of unlawful discrimination, where an OCP increases revenues without cross-subsidy from basic service, we believe it is advantageous to permit such pricing options.

[30] MCI also argues that BOT is priced predatorily and is designed to eliminate competitors from the market. MCI apparently equates the antitrust concept of "predatory" pricing with an unreasonably low rate that would violate the Section 201(b) prohibition of unjust and unreasonable charges. Because AT&T has proved that BOT increases net marginal revenues, and hence recovers marginal expenses, its offering is not predatory under antitrust law principles. *See* MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1119-23 (7th Cir. 1981), *cert. denied*, 464 U.S. 891 (1983); Northwestern Tel. Co. v. AT&T, 651 F.2d 76, 90 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

decided to submit no probative evidence in this proceeding although it was given the opportunity to do so. Rather, MCI modified some of the data in AT&T's evidentiary submissions on the basis of assumed scenarios in order to cast doubt on certain assumptions contained in those filings. The principal issues with which MCI took exception are the validity of a study of daytime and evening demand stimulation, customer usage patterns, and AT&T's treatment of NTS access charge expense.

1. Daytime and evening demand stimulation

21. As set forth in paragraph 9, *supra*, AT&T conducted a survey of 30,000 MTS customers for the period July through December 1984 to determine the extent of demand stimulation from BOT and, in turn, the amount of marginal revenue attributable to such stimulation.[31] MCI contends that AT&T's projections are erroneous and that, when MCI's adjustments are made, BOT will produce marginal losses in each of the three years following BOT's introduction. MCI contends that the results of AT&T's tracking study are insufficiently reliable for extrapolation to the full three-year period of analysis.

22. MCI argues that AT&T's projections of evening period demand are implausible, and it asserts AT&T assumes that subscribers to BOT "Option B" will increase their evening-period usage by over 39 percent. MCI submits that it would be reasonable to assume an elasticity factor of −1.0.[32] It notes that such a factor was "cited as appropriate in the recent AT&T PRO America proceeding."[33] MCI argues that if AT&T's projections for evening stimulation are adjusted to reflect an elasticity of −1.0, BOT cumulative earnings would be reduced by $6,800,000 over the three years.[34]

23. MCI contends that AT&T's demand projections are further flawed to the extent that they include some daytime stimulation. MCI argues, without evidentiary support, that it makes no economic sense to assume that BOT will stimulate demand for

[31] *See* Statement of Roscitt at 3 (Sept. 30, 1985).

[32] Elasticity of demand is the percentage change in quantity demanded caused by a one percent change in price. *See* AT&T Communications, Inc., Revisions to Tariff FCC No. 1, FCC 86-249, at para. 15 (released May 14, 1986) (*Pro 2*).

[33] AT&T Communications Tariff F.C.C. No. 1, Pro America Optional Calling Plan, CC Docket No. 85-128, FCC 85-510 (released Sept. 18, 1985). AT&T filed a revised version of its Pro America plan on February 11, 1986. Petitions to reject this filing were denied, and the service was permitted to take effect in AT&T Communications, Revisions to Tariff F.C.C. No. 1, FCC 86-249 (released May 14, 1986) (*Pro 2*).

[34] MCI Additional Brief, exh. 4 (Dec. 4, 1985).

daytime MTS since BOT subscribers pay exactly the same rates for daytime MTS as AT&T's other MTS customers. Thus, it concludes that no such stimulation can be expected. MCI asserts that if AT&T's data are calculated on the assumption that BOT will not affect demand for daytime MTS, earnings projections for BOT would diminish by varying amounts in years one, two, and three, with a cumulative reduction in earnings of $8,400,000 over the entire three-year period.[35] Thus, in sum, MCI states that cumulative earnings should be reduced by $15.2 million in the time period.[36]

24. Although MCI has not presented evidence on the issue of daytime and evening demand stimulation, it asserts in its briefs that the results of AT&T's study of stimulation reflect a price elasticity of −2.4 (later increased to −2.6), which it claims unrealistic. *See* MCI Additional Brief at 15-16 (Dec. 4, 1985); MCI Additional Reply at 23 (Jan. 24, 1986). It cites submissions made by AT&T in *Pro America* that the demand elasticity coefficient for that service was −1.1 (later decreased by staff analysis to −0.87). In sum, MCI claims by inference that if daytime MTS dial usage demand elasticity is −1.1, then demand elasticity relating to BOT service cannot be −2.6. AT&T's assumptions concerning stimulation of such demand are derived from a statistical analysis of data obtained by surveying the actual behavior of thousands of customers. *See, e.g.*, AT&T Answer, Affidavit of Harvey at 5. AT&T has submitted affidavits which establish that the individuals who conceived and conducted the survey and associated analysis are expert in their relevant disciplines. From their account of the techniques employed, it appears that the results are probative. Indeed, it is clear from the study that increased usage in fact occurred in both the daytime and evening period over the duration of the study for customers who were taking BOT service. This was not a series of future projections, but an examination of actual customer behavior.

25. MCI does not contend that there are flaws in the technique of the study and none are apparent to us from the record. Rather, it contends, with evidentiary support, that the results of the first year demand stimulation study cannot be applied to projections for years two and three. Evidence based on relevant experience outweighs, in our estimation, the speculation that MCI raises by way of rebuttal briefs. It is not illogical that the demand

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[35] MCI Additional Brief, exh. 5 (Dec. 4, 1985).

[36] In its Additional Reply filed on January 24, 1986, MCI adjusted its total claim to $17.4 million (*see* exhs. 4 and 5).

elasticity associated with provision of an off-peak service might be significantly higher than that associated with daytime services, such as those included in the *Pro America* offering.[37] Calls during non-business hours are more discretionary than those during peak business periods. Indeed, it is this triusm that forms the basis of MTS rate schedules as they exist today.[38] Further, it appears from actual consumer behavior that greater use of MTS during off-peak hours will stimulate a modest additional use of service during daytime hours.[39] The complainant's assertions are utterly without evidentiary basis and provide no support upon which we can rely. Therefore, we accept the results of AT&T's study of traffic stimulation presented in this proceeding.

2. Customer Usage Patterns

26. The record indicates conclusively that during the study period described in the testimony of Richard R. Roscitt, dated September 30, 1985, only 41.4 percent of BOT customers utilized the full monthly allotment of time to which they were entitled. Indeed, almost 30 percent of the customers utilized less than 20 minutes of their alloted time. AT&T bases its projections on the level of actual usage experienced during the study period. The customer utilization factor is critical since the greater the total of "unused" minutes of use among BOT subscribers, the greater the profitability due to the lower access costs and greater revenue per minute of use.

27. MCI does not take exception to the methodology or results of the AT&T study. Rather, it asserts that it is unreasonable to extrapolate the results of the study for the full three-year period.

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[37] Indeed, in AT&T's Brief at 44-46 (Jan. 10, 1986), AT&T explained that because the *Pro America* OCP is aimed primarily at business subscribers, there is no basis for assuming that the same price elasticity would be appropriate for a plan such as BOT, which is marketed to residential customers placing calls in the night/weekend and evening rate periods. It argues further that the -2.4 price elasticity figure claimed by MCI is excessive because it includes the effects of cross-industry elasticity as well. AT&T Brief, Statement of Roscitt at 16-17 (Jan. 10, 1986). In any event, AT&T emphasizes that MCI's speculation notwithstanding, the stimulation of demand it has observed is based on actual consumer behavior. *Id. See also* AT&T Brief, Statement of Dr. John G. Ramage at 6-7, (Jan. 10, 1986). AT&T adds that the 1984 tracking study demonstrating such demand stimulation is confirmed by customer use data in a separate 1985 AT&T study. *See* AT&T Additional Reply at 6 & 9-11 (Feb. 10, 1986).

[38] *See* AT&T, 86 FCC 2d 820 (1981), discussing the impact of time-of-day pricing generally.

[39] *See* AT&T Answer, Affidavit of Harvey at 5 (Mar. 28, 1985), in which AT&T demonstrated from the results of its survey of actual BOT usage that customers greatly increased their total off-peak calling and that daytime usage also increased to some extent. *See also* AT&T Brief at 46 (Jan. 10, 1986).

MCI argues that it is unreasonable to assume that so high a proportion of BOT subscribers will betray what it perceives to be their economic self interest for any considerable length of time. MCI points out that AT&T's tracking study was conducted at a time when the $10 charge probably was still being waived and hence when customers might experiment with the offering at no initial expense. Further, MCI hypothesizes that many customers may have subscribed at that time without understanding that it was not in their interest to do so. It argues that this low utilization rate will not continue since customers will either terminate the service or increase their usage to the full 60 minutes and that only those customers who actually use the full alloted time period will continue to subscribe to BOT. MCI asserts that if one assumed that all subscribers using less than 40 minutes of their alloted time in two of the three months in the study period were to drop BOT, the service would experience a marginal loss of $6,100,000 for year two and a cumulative after-tax loss of $20,800,000 over the entire three-year period. In the alternative, MCI alleges that if all low usage customers increased their usage to the full 60 minutes, BOT would lose $5,000,000 after taxes over the three-year period. *See* MCI Additional Reply, exhs. 2 & 3 (Jan. 14, 1986).

28. AT&T responds that MCI's analysis is speculative and does not overcome AT&T's actual experience with customer usage patterns as evidenced in the studies it conducted. In addition, AT&T asserts that MCI's speculation is flawed. AT&T argues that there are many reasons why customers may use less than the fully allotted time—*e.g.*, because they desire to know the precise amount of long distance charges they will be billed each month for budgeting convenience and because a large proportion of BOT customers subscribe to Option B which permits a 15 percent discount from evening period rates. These customers may find the 15 percent discount significant enough to offset their paying for an hour of calls which they do not fully use.

29. Here again, as with its arguments concerning daytime- and evening-period stimulation, MCI challenges assumptions that are founded upon empirical observation solely on the basis of speculation. AT&T has provided probative evidence on this point which is persuasive. The thrust of MCI's argument is that such evidence is contrary to its view of human behavior, but it has offered no evidence to support that argument. We further note that the indication provided by the earlier tracking study is confirmed by another study that AT&T conducted in June, July,

and August 1985. It can be readily deduced from the data reported that the percentage of BOT subscribers using less than 40 night/weekend MOU in a given month was virtually the same in the latter period as was the case in the earlier study. We therefore find AT&T's analysis, which shows that BOT currently increases net MTS revenues, to be probative. We have no basis, therefore, to order AT&T to withdraw the BOT offering.

30. While we base our holding on a comparison of incremental revenues with the incremental cost of providing service, we note the correlation between BOT rates and ordinary night/weekend MTS rates. According to the evidence of record, the average per-minute charge under ordinary night/weekend rates for calls of the same average length and duration is approximately equal to that which is paid by BOT customers who use 59 minutes of service per month. Statement of Roscitt at para. 8 (Jan. 10, 1986). AT&T indicates that 58.6 percent of BOT customers use 60 minutes or less of night/weekend calling in any given month. Statement of Roscitt at para. 13 (Sept. 30, 1985). Indeed, 44.9 percent of BOT subscribers use less than 40 minutes of service per month. Statement of Roscitt, fig. 4 (Sept. 30, 1985). This support the conclusion that, for a majority of BOT customers, billing convenience and the 15 percent evening rate discount are the main attractions of the service and that, on the whole, BOT may be no less remunerative than ordinary night/weekend MTS.

3. NTS Access Charge Expense

31. MCI's final argument is that AT&T is not entitled to utilize the benefits of demand stimulation to justify its access charge assumptions. MCI asserts that AT&T must utilize what it characterizes as "out of pocket" access expense. AT&T, on the other hand, asserts that an access charge benefit arising from BOT demand stimulation is properly reflected in its revenue and cost analysis. It explains that its analysis is consistent with the net revenue test developed in the *OCP Guidelines Order*, because it recognizes that as AT&T stimulates use through an OCP, its share of total NTS costs increases, but the NTS cost per minute falls as the fixed NTS costs are spread over a larger number of minutes of use.[40] It explains further that, because it realizes a savings in lower NTS charges on all of its minutes of access, its total NTS bill increases by less than the amount billed for the

[40] Since the NTS switched access charge per minute relates to a fixed revenue requirement that does not vary with minutes of use, each additional minute generated by an OCP reduces per minute access charges to all carriers.

stimulated minutes. It argues that the difference is the access charge benefit attributable to the OCP stimulation. AT&T Brief at 47 (Jan. 10, 1986). Thus, the increase in AT&T's interstate NTS expense relating to BOT demand stimulation was formulated as the net of the increase in NTS charges resulting from stimulation and the decrease in NTS charges to all AT&T minutes resulting from the lower NTS charge per minute. *Id.* at 49-50.; Statement of Link at 1-3 (Jan. 10, 1986); Statement of Link at 6-12 (Oct. 15, 1985).

32. We have reviewed the testimony of record and are persuaded that demand stimulation should be considered in the overall calculus of BOT ratemaking. Indeed AT&T's methodology is consistent with the recent OCP guidelines. This Commission recognized in the NPRM leading to adoption of the guidelines that demand stimulation may have an effect on costs. *See NPRM* in CC Docket No. 84-1235, 50 Fed. Reg. 1881 at para. 37. The guidelines themselves require that an OCP increase the filing carrier's net revenues for switched services (its total switched services revenue less its total cost of providing switched services, including access charges), rejected the notion that the FDC test should be applied to these costs, and recognized that OCP stimulated demand may result in decreased costs, including access costs. *OCP Guidelines Order, supra*, at paras. 40-56. As recently as May 1986, we have permitted AT&T to take the access cost savings into account in calculating net revenues generated by its *Pro 2* offering.[41] As we stated in the *OCP Guidelines Order*, the critical element of analysis is that the service category make a positive revenue contribution over the relevant study period. The evidence of record shows that AT&T will do so for the foreseeable future. Thus, the prong of the *OCP Guidelines Order* test that requires an increase in projected OCP net revenue within twelve months after the effective date of any revisions which reflect projected stimulation due to the OCP is met. Further, the other prong of the test that requires recoupment of initial losses within a three year period is also met.

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[41] *Pro 2, supra*, at paras. 55-61. We stated that "[t]o the extent that *Pro 2* stimulates additional industry MOU ('pure' stimulation), it will increase the MOU that is used for purposes of calculating the carrier common line charge ('CCL') and thereby reduce the per minute CCL." *Id.* at para. 55. We thus concluded that attribution of CCL cost savings to *Pro 2* was consistent with the *OCP Guidelines Order*. *Id.* at para. 61.

D. Future Results

33. Although we conclude that MCI has failed to meet its burden of proof in sustaining its charge that BOT is unlawful, it is possible that at some future date the offering could become unlawful if AT&T's projections are not realized. Customer usage patterns may change and projected access charge changes may not materialize. Therefore, in line with the requirements set forth in the *OCP Guidelines Order*, 50 Fed. Reg. at 42,952, we require AT&T to submit reports disclosing BOT's effect on its net switched services revenue beginning in the first quarter of year two and continuing for each quarter through year three. AT&T should submit its reports for July 1, 1985, through March 31, 1986, by July 31, 1986. Each subsequent quarterly report is due by the end of the quarter following the quarter which is the subject of the report. As set forth in the *OCP Guidelines Order, id.*, changes in the basic MTS rates must be identified and isolated from the OCP revenue effects in these quarterly reports. The reports for years two and three should be supported by updated studies of demand stimulation and customer utilization and shall conform to such further requirements as the Chief of the Common Carrier Bureau may hereafter specify.

IV. CONCLUSION

34. Based on the foregoing, we find that AT&T's losses from BOT in its first year of operation were $13,117,000. Under the "no-growth" assumption, its positive contribution in year two will be $21,517,000 and in year three will be $20,922,000 for a total profit over the study period of $29,322,000. Under its "growth" assumption, AT&T's positive contribution will be $19,230,000 for year two and $47,209,000 for year three, yielding a total profitability for the period of $53,322,000. As set forth in the Statement of Dennis C. Nelson dated January 10, 1986, the present value of these earnings streams, discounted at 12.75 percent (AT&T's rate of return allowed by the Commission), is $20.7 million for its "no-growth" scenario and $38.0 million for its "growth" scenario. Since we are well into the second year of the service and it appears that BOT continues to be heavily promoted, we believe that the "growth" hypothesis is the more reliable one. Thus, it is clear from the evidence before us that AT&T will earn greater "net switched services revenue" in year two and in year three as a result of offering BOT than it otherwise would without such a plan. Since only one quarter

remains in year two, we conclude that BOT is contributing marginal "net revenue" on a current basis. Further, the evidence is overwhelming that BOT will continue to make a contribution for the foreseeable future and that the complaint is therefore without basis.

35. Accordingly, IT IS ORDERED that the complaint filed by MCI Communications Corp. on February 28, 1985, IS DENIED.

36. IT IS FURTHER ORDERED that AT&T SHALL SUBMIT quarterly reports as described in paragraph 33 herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Study results regarding average increase in monthly usage among customers who subscribe to BOT, as reported by AT&T:

Average Minutes of Use Per Customer Per Month

Before Subscription to BOT	80.46 Minutes
After Subscription to BOT	114.13 Minutes
Increase	33.67 Minutes
Percent Increase	41.8%

Average Revenues Per Customer/Month

Before Subscription to BOT	$ 18.05
After Subscription to BOT	$ 27.37
Increase	$ 9.32
Percent Increase	51.6%

Source: AT&T's Answer, Affidavit of H. E. Harvey, Jr. (Mar. 28, 1985).

APPENDIX B

AT&T's estimate of marginal cost, revenues, and after-tax earnings for BOT in year one and its projections of these variables for years two and three under "no-growth" hypothesis:

Revenues and Costs
Block-of-Time Plan
No-Growth
(Thousands)

	Year One	*Year Two*	*Year Three*
REVENUES			
MTS Revenues (less Settls.)	$ 83,449	$ 109,252	$ 93,638
Less: Uncollectible revenues	812	3,768	3,235
NET MTS REVENUES	$ 80,687	$ 105,484	$ 90,403

	Year One	*Year Two*	*Year Three*
EXPENSES & TAXES			
Maintenance	$ 634	$ 956	$ 898
Depreciation & Amort.	788	1,272	1,140
Traffic Expenses	346	591	562
Coml. & Mktg. Expenses	55,975	1,436	780
Operating Rents	326	323	292
Relief And Pensions	423	332	311
Gen'l. Svc. and Licenses	181	297	274
Gen'l. Expenses & Other	637	995	904
Other Taxes	(2,967)	6,475	6,216
Access Charges	49,007	53,281	40,557
Federal Taxes on Income	(11,548)	18,010	17,545
TOTAL EXPENSES & TAXES	$ 93,804	$ 83,967	$ 69,481
NET EARNINGS	$ (13,117)	$ 21,517	$ 20,922

Source: Statement of Dennis C. Nelson, fig. 1 (Oct. 15, 1985).

Revenue and Costs
Block-of-Time Plan
With Growth
(Thousands)

AT&T's projections of BOT performance under "growth" hypothesis:

	Year One	*Year Two*	*Year Three*
REVENUES			
MTS Revenues (less Settls.)	$ 83,499	$ 210,237	$ 301,752
Less: Uncollectivle revenues	$2,812	7,198	10,372
NET MTS REVENUES	$ 80,687	$ 203,039	$ 291,385
EXPENSES & TAXES			
Maintenance	$ 635	$ 2,873	$ 3,964
Depreciation & Amort.	788	2,222	3,456
Traffic Expenses	346	1,055	1,728
Coml. & Mktg. Expenses	55,975	54,787	51,549
Operating Rents	326	819	1,136
Relief and Pensions	423	1,005	1,367
Gen'l. Svc. and Licenses	181	907	1,226
Gen'l. Expenses & Other	627	2,734	3,750
Other Taxes	(2,967)	7,484	14,127
Access Charges	49,007	94,230	122,618
Federal Taxes on Income	(11,548)	15,693	39,254
TOTAL EXPENSES & TAXES	$ 93,804	$ 183,809	$ 244,254
NET EARNINGS	$ (13,117)	$ 19,230	$ 47,209

Source: Statement of Dennis C. Nelson, fig. 2 (Oct. 15, 1985).

Common Carrier, Interstate
Interstate Communications
Rate of Return
Reconsideration, Petitions For

Memorandum Opinion and Order on Reconsideration adopted addressing questions raised in petitions for reconsideration of the *Phase II Order*, 51 FR 1795 (Jan. 15, 1986), and addresses comments filed by seventeen parties.
Rates of Return
CC Docket No. 84-800

FCC 86-353

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers	CC Docket No. 84-800 Phase II

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: August 7, 1986; Released: August 25, 1986

BY THE COMMISSION: COMMISSIONER DAWSON DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER DENNIS NOT PARTICIPATING.

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I. INTRODUCTION AND SUMMARY

1. This rulemaking proceeding was instituted to develop new procedures for represcribing an authorized rate of return for telecommunications services of carriers that are regulated by this Commission. We subsequently expanded the scope of this proceeding to modify procedures to enforce a rate of return that has been prescribed. The enforcement procedures were adopted in a Report and Order in September 1985 (*Phase I Order*)[1] and modified in March 1986 (*Phase I Reconsideration*).[2] The represcription procedures and methodologies were adopted in a Report and Order in December 1985 (*Phase II Order*)[3] and codified as Part 65 of this Commission's Rules. This Order addresses questions raised in petitions for reconsideration of the *Phase II Order*, and addresses comments filed by seventeen parties.[4]

2. The Part 65 Rules are applicable to the interstate access services of all local exchange carriers (LECs) and the interstate services of the American Telephone and Telegraph Company

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[1] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527, released September 30, 1985.

[2] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 86-114, released March 24, 1986.

[3] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase II, FCC 85-645, released December 20, 1985.

[4] The parties filing petitions for partial reconsideration, oppositions to those petitions, and replies are listed in Appendix A of this Order. In addition, comments in support of the petitions were filed jointly by the Elkhart Telephone Company and the Fidelity Telephone Company; motions to exceed the requisite page limit were filed by Southwester Bell (Southwestern) and NYNEX; and a petition to accept a late-filed pleading was filed by the Bell Atlantic Task Force (Task Force). Because the latter three petitioners raised important issues that merit consideration in this Order, and because consideration of the pleadings will not prejudice any parties to this proceeding, the abovementioned petitions are granted.

subsidiary known as ATTCOM. We decided to establish a separate rate of return for ATTCOM and to establish one rate of return for all LECs. Represcriptions are to occur at two-year intervals beginning with the 1987-1988 period. Under the *Phase II Order*, three basic approaches will be used to compute a number that is a proxy for an interstate access return. The first approach uses a composite average of rates of return authorized by state commissions in each state where the Bell Operating Company is the principal carrier. The second approach uses a composite average of rates of return computed for each of the Bell regional holding companies (RHCs). The third approach uses a composite average of rates of return for firms that are comparable to an interstate access service provider. Various screens are used to produce a list of comparable firms. This third approach is also used to compute a proxy for an ATTCOM rate of return, but the screens used would identify a different group of comparable firms.

3. The second and third approaches adopted in the *Phase II Order* use the measurement data, actual capital structure and embedded cost of debt of the RHC or comparable firm to derive an overall return based upon weighted debt and equity costs. Two variations of the discounted cash flow (DCF) methodology are used to compute the cost of equity component. The DCF formula requires identification of a stock price, a dividend and a growth factor. Both variations use the average share price over a two-year period and the average dividend paid during that two-year period. The first, or G1, variation uses the growth in dividends that actually occurred during the two-year period to determine the growth factor. The second, or G2, method averages analysts' growth forecasts for the firms as reported by the Institutional Brokers Estimate Service (IBES) survey over the same two-year period. The forecasts in each report are also averaged, through use of the median, to derive a composite forecast.

4. We have decided to reject requests to reconsider our decisions to establish one authorized or target return for all LECs, to consider a composite average of state authorized returns in establishing a LEC return, to use an annual model in the DCF computations, and to allow a one-time ten basis point allowance for flotation costs. We will, however, reexamine the carrier groupings in a subsequent proceeding. We have not accepted suggestions that we substitute a different set of analysts for the IBES forecast, but have decided to collect enough data to enable us to compute alternatives to a median IBES forecast. We are not

modifying the comparable earnings screens, deleting the G1 variation or adding a capital asset pricing model proxy in this Order, but we have decided to issue a Second Supplemental Notice at a later date to examine those and other subjects, including carrier groupings, before the 1989-90 period. Problems encountered in the screens and the G1 variation will, of course, be taken into account in weighing the estimates in the Phase III (or 1987-88 represcription) record.

5. We have decided to accept the suggestion that all DCF formulas be modified to include a next-period dividend in lieu of a dividend that is contemporaneous with the growth forecast and stock prices. Although we have not been persuaded by arguments that we should rely exclusively upon the last growth forecast in a measurement period and stock prices that are contemporaneous with that forecast, we have decided that a methodology that resembles the traditional or classic DCF methodology must be included in order to avoid undue reliance upon historical data. We are deferring codification of this methodology until the next phase in order to obtain additional comment on several issues.

6. We are, however, adopting a few other modifications in the Part 65 Rules in order to clarify particular matters.

II. GROUPING OF CARRIERS

A. Use of Two Groups

7. In a notice of proposed rulemaking (*NPRM*),[5] we initially proposed segregating the carriers into ten groups for purposes of prescribing rates of return.[6] In a *Supplemental Notice*,[7] however, this proposal was modified in favor of two groups: one overall return for the interstate exchange access services of the local exchange carriers (LECs) and a separate return for the regulated interstate services of ATTCOM. This two-part grouping was adopted in the *Phase II Order*. While none of the petitioners dispute that separate treatment for ATTCOM is proper, a number of carriers object to the prescription of a single rate of return for the LECs, arguing that the decision is not supported by consider-

[5] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket 84-800, FCC 84-385, released August 13, 1984.

[6] The *NPRM* proposed separate rates of return for ATTCOM, each of the seven regional Bell holding companies, the GTE companies, and a uniform rate for all other exchange carriers.

[7] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket 84-800, FCC 85-458, released August 14, 1985.

ations of administrative efficiency, judicial precedent, various industry studies or fairness to the carriers.

8. Several carriers state that a prescription methodology must balance fairness to the carriers against administrative efficiency, and argue that the perceived burden on administrative resources does not justify a unitary grouping for the LECs. It is also argued that the original methodology proposed in the *NPRM* imposes less of a burden on Commission resources than that adopted in the *Phase II Order*,[8] and that, because we are already collecting the data necessary to make separate prescriptions, little additional effort is required to make the calculations.[9] In addition, several carriers argue that any administrative burden could be further reduced if we adopt a staggered represcription period, similar to that used in our depreciation represcriptions.[10]

9. These arguments are opposed by the Puerto Rico Telephone Company (PRTC), which argues that departure from a unitary grouping would require many individual rate of return prescriptions and would result in administrative paralysis.[11] PRTC also opposes a staggered sequence of represcription proceedings. PRTC argues that interest and bond yield rates exhibit such volatility that prescribing rates of return for different carriers months or years apart would be patently inequitable, and states that "[t]he changes in rate of return prescription *over time* are thus far more serious than the distortions at any one time *among carriers*."[12] SNET replies that no carrier has shown conclusively that administrative paralysis will result, or that any carrier will be harmed by adoption of the grouping plan proposed in the *NPRM*.[13]

10. We reject the arguments that the unitary grouping approach will not yield administrative savings. First, the carriers arguing that the approach adopted in the *Phase II Order* is more burdensome than that proposed in the *NPRM* fail specifically to address the unitary grouping issue. Rather, they argue that, on the whole, the methodology adopted in the *Phase II Order* imposes a greater burden on Commission resources than that proposed in the *NPRM*. These carriers fail to recognize that any increased burden is not a function only of the number of

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[8] GTE Petition at p. 4; Southwestern Petition at pp. 5-6.
[9] USTA Petition at pp. 8-9.
[10] BellSouth Petition at p. 16; GTE Petition at p. 5; NYNEX Petition at p. 6; SNET Petition at pp. 6-9.
[11] PRTC Opposition at pp. 2-4.
[12] *Id.*, at pp. 5-6 (emphasis in original).
[13] SNET Reply at pp. 3-5. *See also* BellSouth Reply at p. 2.

prescriptions that will be determined, but also of the increased amount of data found necessary in the *Phase II Order*. The value of such data was established in the *Phase II Order* and is discussed in section IV of this Order, *infra*. The petitioners have not shown that adoption of the *NPRM's* grouping plan for use with the *Phase II Order's* methodology will yield administrative savings or greater accuracy.

11. Second, we find that the argument that calculating additional rates of return involves little additional investment in Commission resources lacks merit. In the *Phase II Order*, we specifically found that, "[w]hile it is true that one of the measurements of the overall cost of capital for all LECs is computed using estimates of the cost of capital of each of the RHCs . . . it is not accurate to claim that no additional effort would be needed to prescribe individual RHC rates of return for *interstate services*."[14] Because the issue of administrative savings was discussed in depth in the *Phase II Order*, we will not consider this argument further in this Order.[15]

12. Moreover, it is probably unrealistic to compare the *NPRM* proposal with the rule we adopted for purposes of measuring the administrative burden that would result from failing to adopt a uniform return for all exchange carriers. If the RBOCs received individual return prescriptions, many other carriers would likely seek the same treatment and probably could demonstrate that the differences between that carrier and any RBOC are greater than differences among RBOCs. The petitioners have not as yet demonstrated that individualized computations for RBOCs would be consistent with any carrier grouping that would enable this Commission to complete represcription proceedings within a reasonable period of time.

13. Finally, we reject the contention that, for this represcription period, a staggered sequence of represcription proceedings is a desirable alternative to the comprehensive biennial represcription established in the *Phase II Order*. Because we have determined that a unitary grouping is warranted for at least the initial represcription period and that a single rate of return applicable to the LECs is proper, it is unnecessary for us to consider the merits vel non of staggered proceedings. If, however, we find that

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[14] FCC 85-645 at para. 7 (emphasis in original).

[15] We similarly will not discuss Southwestern's allegation that we failed to support our decision to replace the ten-part grouping proposed in the *NPRM* with the unitary LEC grouping plan. Southwestern Petition at pp. 4-5. That decision was explained extensively in the *Supplemental Notice* at paras. 33-38 and in the *Phase II Order* at paras. 4-17.

multiple rate prescriptions are required in future proceedings, we may find it necessary to revisit this issue.

14. Petitioners next argue that a system that groups the RBOCs together contravenes court precedent. They claim that relevant decisions require that regional differences among carriers be considered in a rate of return proceeding. USTA objects to unitary grouping of exchange carriers for determination of interstate access rates of return upon the ground that unitary grouping is not an acceptable response to the dilemma of separating interstate and intrastate costs, because it entails an unjustifiable departure from cost-based pricing.[16] USTA relies upon *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984). In that case, the court ruled that FERC could not permit rates of return which constitute exploitation, abuse or overreaching in order to encourage exploration and development; that inadequate justification was given for consideration of non-cost factors in permitting rates above fully allocated costs; that the "zone of reasonableness" involves a complex inquiry; and that the reliable starting point for rate regulation is an inquiry into costs. *Id.*, at 1502-3. We cannot agree that *Farmers Union* prohibits unitary grouping. USTA fails to explain why it believes any non-cost factors have been introduced to determine rates of return in this proceeding. The similarity of risk facing all providers of interstate exchange access and the other factors discussed in the *Phase II Order* justify the use of a uniform rate of return for all exchange carriers.

15. Similarly, BellSouth and USTA contend that Supreme Court precedent requires that this Commission prescribe interstate access rates of return by geographic regions rather than on a nationwide basis. BellSouth asserts that the great size and growth rate of its service area entitle it to individual treatment. BellSouth does not, however, provide factual comparisons of itself to other RBOCs or LECs, does not explain the relationship of its asserted demographic characteristics to the grouping of carriers for interstate access rates of return, nor cite any authority for the proposition that regional ratemaking is preferred over nationwide ratemaking.

16. USTA contends that other regulatory authorities have taken geographic differences into account in selecting groupings. In support of this contention, USTA cites *The Permian Basin Rate Case*, 390 U.S. 747 (1968) (*Permian Basin*) and *The New*

[16] USTA Petition at p. 14.

England Divisions Cases, 261 U.S. 184 (1923) (*New England*). We find these cases inapposite, however. The issue of the appropriateness of the particular grouping scheme selected by the agency was before the Court in neither case. We also reject USTA's conclusory assertion that there are substantially different, although unspecified, market conditions in distinctly different, although unspecified, regions of the country, and that it is unfair to use a nationwide grouping when more equitable alternatives exist. The authority upon which this Commission's discretion to prescribe multi-carrier interstate access rates of return rests does not require the selection of the best possible alternative. Rather, it is within this Commission's discretion to prescribe multi-carrier rates of return for nationwide, geographic or other regional groupings, as long as the procedure is reasonable in light of all the circumstances.[17] It is within the Commission's discretion to adopt a unified grouping scheme for all exchange carriers, especially when we have provided carriers with the opportunity to seek special relief by requesting exclusion from the group and individual treatment.[18] Accordingly, we cannot find that petitioners have presented a case for eliminating a nationwide grouping for interstate access rate of return represcriptions at this time.

17. Petitioners also argue that unitary grouping is inconsistent with studies of bypass and showings made in various LEC petitions. Petitioners contend that bypass studies, including this Commission's own study, establish that the threat of bypass is greatest among high-volume business users, and that such users "are not spread uniformly throughout the territories of the various LECs, but are highly concentrated."[19] Moreover, BellSouth argues that the carriers' participation in the National Exchange Carrier Association's (NECA) pools does not mitigate the variations in carrier-specific risk levels because most of the BOCs have withdrawn from the optional pools, and, at least in BellSouth's case, the revenues derived from the mandatory Common Line Pool represent only 54 percent of interstate access revenues.[20] Petitioners conclude that our unitary grouping system is inconsistent with the bypass studies because it fails to reflect

[17] *Permian Basin*, 390 U.S. at 756-59, 761-62, 768-70, 774-77 & 788-89; Chicago & North Western Ry. Co. v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 326, 340-43 (1967); United States v. Louisiana, 290 U.S. 70, 75-77 (1933); *New England*, 261 U.S. at 197-99.

[18] *See Permian Basin*, 390 U.S. at 756-59, 761-62, 774-77, 788-89.

[19] BellSouth Petition at p. 17 (citations omitted). *See also* Pacific Petition at pp. 3, 5.

[20] BellSouth Petition at p. 18.

different levels of bypass-related risk among LECs. Similarly, USTA cites a number of LEC petitions for modification or waiver of our access rules that "note the very real impact of bypass."[21] Petitioners contest our conclusion in the *Phase II Order* that "[w]ith respect to bypass, at this point in time claims regarding differing impacts are speculative."[22] USTA asserts that "[t]he grouping plan adopted at the close of this proceeding is likely to be utilized for several years to come," and concludes that our failure to address "anticipated and predictable changes" that will result from bypass disserves the carriers and the public interest.[23]

18. PRTC responds that the carriers failed to show that bypass concerns militate against a unitary grouping. PRTC argues that, among the ten carrier groups proposed in the *NPRM*, each group contains concentrations of high-volume business users, and that "[n]o petitioner has demonstrated that the potential for bypass differs significantly among the Bell regional holding companies or even between the RHCs and the GTE companies."[24] In reply, SNET states that "bypass, both actual and potential, is the LECs' primary business risk."[25]

19. We reject the argument that, at present, the RHCs' experience with bypass is sufficiently discrepant to merit the prescription of separate rates of return. First, no petitioner has quantified the differences in the amount of bypass experienced or expected by the respective RHCs, or suggested any measure of the difference in the risk reasonably related to it. Similarly, the contention that declining participation in NECA pools should affect our prescription is unfounded. BellSouth's argument that pooling does not mitigate its risk levels significantly because Common Line Revenues constitute only 54 percent of its total interstate revenues is conclusory. BellSouth offers no quantitative showing to support its claim that differences in pool participation affect the risk position of LECs or RBOCs. Absent such a showing, we cannot accept the BellSouth argument. Second, we find that petitioners have failed to rebut the PRTC argument that, at least at present, disparities in concentrations of high-volume business users that may make particular LECs more vulnerable to bypass than others are not sufficient among the seven RHCs to warrant individual returns. Finally, we dismiss as

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[21] USTA Petition at p. 12.
[22] FCC 85-645 at para. 8.
[23] USTA Petition at pp. 12-13.
[24] PRTC Opposition at pp. 7-8.
[25] SNET Reply at p. 6.

wholly unsubstantiated USTA's allegation that the unitary grouping plan adopted in the *Phase II Order* will be used to prejudical effect in the future, and that the analytical model we have adopted is incapable of responding to changes in the industry. The *Phase II Order* clearly states our intention to modify our analytical models as changes in the characteristics of the carriers or in the economic environment dictate.[26]

20. In their next arguments against unitary grouping, petitioners assert that the approach cannot be justified by our finding that the LECs face similar levels of risk in providing interstate access. Rather, they contend that unitary grouping is inherently unfair because it fails to account for divergent levels of non-bypass related risk among carriers. Sources of such risk purportedly include differences in capital structure[27] and revenue fluctuation attributable to varying dependence on interstate revenues.[28] Petitioners claim that their argument is supported by analysts' ratings and the LECs' standings in the capital markets, which reflect wide disparities in the perceived risk of the RHCs. The measures of risk cited include the estimated market-based costs of equity submitted by the RHCs, market-to-book ratios, yields to maturity on BOC long-term debt issues, Value Line Beta estimates, Standard and Poor's bond ratings and other credit ratings.[29] These measures purportedly indicate that analysts and investors evaluate the carriers on a total company basis, and do not calculate risk and expected returns on jurisdictional activity alone.[30]

21. In its opposition, PRTC contends that petitioners fail to raise any arguments not already considered and rejected by the Commission. PRTC further argues that the abovementioned differences among the carriers result from differing financial management philosophies, and that, because these measures of risk are largely under the control of the carriers' management, they should not be recognized in the prescribed rates of return.[31]

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[26] *See, inter alia*, FCC 85-645 at paras. 14, 72.

[27] GTE petition at p. 7.

[28] Pacific Petition at p. 3. *See also* NYNEX Petition at p. 7, NYNEX argues that, because 96 percent of its revenues are derived from interstate and intrastate services, risk from unregulated activities is de minimis, and therefore its total company cost of capital should be prescribed as its rate of return for interstate services.

[29] NYNEX Petition at p. 8; Southwestern Petition at p. 18.

[30] Southwestern Petition at pp. 6-9.

[31] PRTC Opposition at p. 6. In addition, Waitsfield, in its Petition at p. 3, argues that "small, individual company variations in costs are not significant" and need not be considered in our represcriptions, and that a unitary LEC group

SNET replies that differences in financial risk, as well as business risk, among the major carriers necessitate individual rate of return prescriptions.

22. PRTC is correct in noting that most of the petitioners' arguments on this issue have been considered and rejected in the *Phase II Order*. In that Order, we specifically rejected the contention that the capital structure of the various LECs had to be considered in our represcription proceeding, stating that "[w]e are not attempting to ensure that stockholders of LECs receive a reasonable return on their overall investments; we are attempting to provide the LECs with an opportunity to earn a reasonable return from services that this Commission regulates."[32] We reiterate that the purpose of our rate of return prescription is to prescribe a rate sufficient to attract investment in activities related to the provision of interstate access service, not extrajurisdictional activities. The *Phase II Order* rejected arguments for taking revenue mix into account for the same reason. Even if we assume, arguendo, that fluctuations in revenues reflect risk related to dependence on intrastate service revenues,[33] that measure of risk is not properly included in our rate of return determination.[34] Moreover, the *Phase II Order* makes clear that the provision for waivers from group treatment serves to protect any carriers that are demonstrably prejudiced by our unitary approach.

23. The *Phase II Order* also specifically rejected the contention that varying evaluations of the BOCs by analysts and the capital markets militates against a unified approach.[35] We noted that these measures of risk are of dubious value in prescribing rates of return for interstate service because they are all premised on a

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rate will "minimize distortions caused by the decisions of individual state commissions."

[32] FCC 85-645 at para. 11; *see also id.* at paras. 7, 9.

[33] The record in this proceeding has not shown that significant differences in risk exist between interstate and intrastate access service. *Phase II Order*, FCC 85-645 at para. 31; *Supplemental Notice*, FCC 85-485 at para. 49; NYNEX Petition at p. 7.

[34] Thus, NYNEX's argument that its revenue mix contains only 4 percent revenues from unregulated activities does not support its claim for an individualized rate of return. Because our composite LEC rate of return will not reflect risk stemming from nonjurisdictional activities, it is a suitable surrogate for NYNEX. NYNEX has not shown that its circumstances are so markedly different from the other LECs that it requires separate treatment. Moreover, if it does wish to make such a showing, it may do so in the context of a petition for waiver of our Part 65 Rules.

[35] Some of those evaluations, such as bond ratings, relate to individual operating companies rather than the RHC.

total company view.[36] The adoption of the unitary prescription approach in the *Phase II Order* was based upon the recognition that the risks that are associated with interstate access must be considered separately from the composite risks that confront each firm. Moreover, while some RHCs argue that their revenue mixes or capital structures differ from that of other RHCs', no petitioner has shown that there are significant differences among all the RHCs. Because the petitioners uniformly proposed adoption of RHC-specific rates of return, and not a BOC-specific return, as an alternative to the unified prescription, allegations of individual company differences do not support the claims for an alternative to the unitary approach.[37]

24. Finally, a number of substantive and procedural arguments are asserted against unitary grouping. Petitioners argue that our rationale for the unitary grouping approach as stated in the *Phase II Order* is flawed. They claim that the *Phase II Order* emphasized the similarity among carriers' interstate risks, and assert that this emphasis is inconsistent with other aspects of our rate of return analysis because we consider state rates of return, which are germane only to nonjurisdictional service,[38] and because the DCF formula uses analysts' forecasts, which are drawn from a total company perspective.[39] Petitioners further allege that the initial data submissions in the Phase II proceeding indicate that some carriers will be undercompensated unless the unitary grouping approach is abandoned.[40] SNET raises the alternative argument that, even if we persist in this approach for the current represcription period, we should commit ourselves to a multiple grouping approach for the 1989 represcription.[41] In addition, Pacific states that we improperly attempt to justify our unitary approach as a "continuation of pre-divestiture ratemaking practices."[42]

[36] FCC 85-645 at para. 12.

[37] Moreover, it is not clear that the market-based evaluations cited by petitioners indicate significant differences among the risk positions of the LECs. For instance, two petitioners assert that reliable Betas cannot be computed from the amount of data currently available. NYNEX Petition, Affidavit of Dr. Litzenberger at p. 9; US West Petition, Affidavit of Dr. Litzenberger at pp. 21-22.

[38] *E.g.* GTE Petition at p. 7.

[39] Southwestern Petition at p. 7-8.

[40] US West Petition at p. 22; *see also* USTA Petition at p. 8.

[41] SNET Petition at p. 8.

[42] Pacific Petition at p. 4.

25. We find that these remaining arguments against a unitary approach lack merit. We reject the arguments that our reference to state rates of return and the use of IBES analyst projections conflict with this finding. As discussed *infra*, the state rates of return are included in our analysis as a relevant point of reference that will complement, and not substitute for, DCF analysis. Inconsistencies between the methodologies used by the state commission are therefore irrelevant.[43] While it is true that the DCF models we will employ include analysts' projections, which are based on total company data, we will use those models' results averaged together for all the RHCs to derive a single, composite rate of return applicable for all LECs. This application of the models is entirely consistent with the unitary grouping approach. The allegation that the initial data submissions indicate that some carriers will be undercompensated is dismissed as conclusory and wholly unsupported. We also decline to commit ourselves to multiple rate determinations for 1989, as SNET requests. We reassert our findings that a multiple approach is not warranted at present. While we will examine the possibility of establishing multiple rate of return represcriptions in the future, before the next represcription period begins, fixing on such an approach at this time would be premature and would deny us the flexibility necessary to respond to changes in the industry and in the economy. Finally, we find Pacific's assertion that we justified the unitary approach as a continuation of pre-divestiture prctices wholly lacking in merit. The statement cited by Pacific was taken out of context. That statement was listed as one of four reasons for refusing to embrace a proposed rate of return calculation that involved a unified RHC return on equity.[44]

B. Waiver from Group Treatment

26. Requests for reconsideration of the Part 65 Rules concerning waiver from group treatment and an individually authorized rate of return for interstate exchange access service fall into four general categories. Petitioners request amendment of the rule requiring that waiver requests be filed with the initial rate of return submissions, and amendment of the rule requiring a

[43] In our quest to perform the most extensive analysis possible, we find that reference to methodologies that utilize different data and different analytical tools to be a highly desirable means to that end.

[44] Moreover, divestiture alone does not render the unitary grouping scheme obsolete. While we recognize that many substantial changes in the industry have been effected by divestiture, carriers opposed to unitary grouping must show how these changes militate against continued use of that approach.

showing of exceptional circumstances to justify exclusion from group treatment for four years. Petitioners also object to the standard of confiscatory rates to obtain waiver and to the requirement that specified financial data be filed with the waiver request.

27. We agree that it would be more efficient and less cumbersome to the exchange carriers to require that waiver requests be filed after the intial rate of return submissions. Accordingly, we adopt the suggestion of United Telecom and Pacific Telesis to amend Section 65.102(c)(2) to require that petitions for exclusion from group treatment be filed with the responsive rate of return submission.

28. We shall also adopt the recommendation of the GTE Telephone Companies, USTA and SNET, and amend Section 65.101(b) to require a showing of exceptional circumstances that would justify exclusion from group treatment for two years, rather than four years. As a result, the waiver period shall be concurrent with the group prescription period. Since we had provided that we would review the individual carrier's required rate of return after two years, even if a waiver were granted, Section 65.101(c), no additional burden will be imposed upon the Commission's resources by shortening the waiver period to two years. Section 65.101(d) is now unnecessary and is revoked. Should any carrier wish to continue exclusion from the group, it would be necessary to file a de novo petition for waiver for the next prescription period.

29. Several petitioners object to the requirement of Section 65.101(a) that before exclusion from group treatment is granted, the unitary rate of return must be determined to be confiscatory as to the individual carrier. It is claimed that the combined effect of Section 65.101(a) and the required showing that exceptional circumstances justify exclusion from application of the unitary rate of return for a period of four (now two) years, Section 65.101(b) will result in carriers being required to endure confiscatory rates for four years. GTE argues that carriers cannot be required to endure confiscatory rates for four years. Ameritech argues that the confiscation standard is manifestly unreasonable and unconstitutional because delay in ending confiscatory rates is a taking of property.

30. We disagree with these arguments. Section 65.101(b) requires a showing of exceptional circumstances that justify exclusion from group treatment for two years. The rule does not require that the exceptional circumstances continue for a full two

years or that the prescribed unitary rate be confiscatory as to the individual carrier for the full two year waiver period. In the *Phase II Order*, we explicitly stated that exclusion from group treatment will not be granted absent a showing that the circumstances "are not of transitory *effect, such that* the exceptional circumstances *justify exclusion for a period*" of two years.[45] If a carrier wishes to obtain a prescribed rate of return greater than the unitary rate of return, then it is only reasonable that the carrier demonstrate that the higher return is justified for the two-year prescription period. The rules contemplate that transitory fluctuations in the required rate of return will not justify a waiver from application of the unitary rate. The rules do not require any carrier to endure confiscatory rates.

31. Several petitioners object that the standard for exclusion from group treatment, that the prescribed unitary rate of return be confiscatory as to the individual carrier, is too strict. Southwestern and Rochester argue that a nonconfiscatory rate is not necessarily a just and reasonable rate. SNET and USTA argue that the zone of reasonableness is between not less than compensatory on the low end and not excessive on the high end. It is urged that a less stringent standard should be adopted, such as a 25 basis point variation from the prescribed unitary rate, significantly different from the prescribed unitary rate, outside the zone of reasonableness, or unjust and unreasonable as to the individual carrier. Petitioners in effect argue that there are nonconfiscatory rates which can be simultaneously less than just and reasonable rates.

32. We disagree. The Constitution requires only that agency-prescribed rates be not so low as to constitute confiscation of a carrier's property. *Permian Basin Rate Case*, 390 U.S. 747, 769–70 (1968) *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936). Southwestern, however, argues that *Hope Natural Gas Co. v. FPC*, 320 U.S. 591, 602 (1944), requires only that rates be unjust and unreasonable, not confiscatory, to be set aside by a court. Petitioner's reliance on the *Hope* case is misplaced. As the Court recognized in *FPC v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 585 (1942), there is a zone of reasonableness within which an agency is free to fix rates, as long as the rates are neither confiscatory nor excessive. The courts are without authority to set aside as too low any reasonable rate which is consistent with this constitutional requirement. *Id.* at 585–86. While the

[45] FCC 85-645 at para. 18 (emphasis added).

Hope case does state that a court will look at whether a ratemaking order is "just and reasonable," 320 U.S. at 602, the *Hope* Court explained that prescribed rates will be upheld as constitutionally sound even if they produce only a "meager" return for investors. *Id.* at 605. The Court in *Natural Gas Pipeline* stated that, "[b]y long standing usage in the field of rate regulation the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense." 315 U.S. at 585. Read together, *Hope Natural Gas* and *Natural Gas Pipeline* uphold our waiver standard, *i.e.*, that confiscation will occur if the carrier is not relieved from the unitary rate of return.[46] As the cases show, a rate that falls outside the zone of reasonableness because it is too low is by definition confiscatory. Currently, Section 65.101(a) states that relief will be granted if the rate is "so far outside the zone of reasonableness . . . as to constitute confiscation." We will modify the language of Section 65.101(a) to remove any doubt concerning its consistency with constitutional standards.

33. An objection was made that Section 65.101 adopts a standard more strict than that proposed in the Order adopting the Rules, because the Order only contemplated "material changes." There is no inconsistency between the Order and the Rules. The Order refers to a situation in which a carrier seeks exclusion from group treatment for an interim period. "[W]e are willing to look at material changes in earnings requirements during the prescription period, so long as the carrier provides compelling evidence that the fluctuation is not simply the result

[46] Banton v. Belt Line Ry. Corp., 268 U.S. 413 (1925), another case relied upon by Southwestern, did state in dicta that a rate could be nonconfiscatory yet unreasonable. *Id.* at 423. That statement, however, was clearly made to support an agency's power to raise rates which it finds are too low, although not necessarily confiscatory, and not to give courts authority to set aside rates which do not meet some judicial notion of "reasonableness". *Id.* at 422-23. Notably, the Court in FPC v. Natural Gas Pipeline cited *Banton* to support regulators' freedom from judicial interference when rates fall within the zone of reasonableness. 315 U.S. at 585-86. Southwestern also relies upon a series of state decisions. Illinois Bell Tel. Co., 29 PUR (NS) 164, 170-71 (1951), in fact adopts the standard that a just and reasonable rate is one above the point of confiscation. *See also* Iowa-Illinois Gas & Elec. v. Perrine, 114 N.E.2d 572, 579-80 (1953). Michigan Bell Tel. Co., 10 PUR (NS) 149, 207 (1935), holds that, when a rate of 6 percent is just sufficient to avoid confiscation, a return of 4.5 percent is not confiscatory provided it is temporary, and that a 6 percent rate of profit over the long term was more than sufficient. Boston Consolidated Gas Co., 12 PUR (NS) 113, 119 (1936), holds that there should be some margin between the merely compensatory rate and a reasonable rate as a "factor of safety," based upon a dissenting opinion in Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276, 296 (1922). This view, however, is followed neither in the federal courts nor generally by the states.

of short term swings or similar events."[47] In contrast, Rule 65.101 sets forth the requirements for obtaining individual treatment for any period of time, whether the entire prescription period or an interim period sometime after prescription.

34. Finally, several petitioners object to the requirements of Section 65.101(a) that audited financial data be submitted with their requests for waiver from group treatment, on the ground that financial statements are not currently produced in the format necessary to satisfy Section 65.101(a) and that the expense of generating such audited data would be prohibitive. We find, however, that as to waiver requests which are supported by financial data for the period before adoption of Section 65.101(a), it is reasonable to waive the requirement that the data be audited.[48]

III. STATE AUTHORIZED RATES OF RETURN

35. Several petitioners raise substantive and procedural arguments against the use of state authorized rates of return as evidence in prescribing the interstate exchange access rate of return. The majority of the substantive arguments focus on three factors that purportedly render consideration of state rates of return improper. Petitioners argue that many of the state prescriptions were made years ago, and that the data is therefore stale; that different state regulators use different, and often inconsistent, methodologies; and that the state rates, prescribed for intrastate service, are irrelevant to our prescription, which considers only interstate risk. In addition, GTE argues that our decision not to consider the average of the intrastate authorized rates of return for ATTCOM applies a fortiori to the LECs.[49] NYNEX also opposes submitting state rate data, but argues that, if we reaffirm our use of that data on reconsideration, we should not limit the LEC submissions to the states in which an RHC is the principal exchange carrier, but should consider all relevant determinations of state Public Utility Commissions (PUCs).[50]

36. The arguments regarding staleness, differing methodologies and differences in interstate versus intrastate risk were all made in the petitioners' original comments in this proceeding. These same arguments were discussed extensively and rejected in the

[47] *Phase II Order*, FCC 85-645 at para. 22.

[48] To date no waiver requests have been filed. Nor has any request to waive any requirement of Section 65.101(a) been filed.

[49] GTE Petition at p. 14.

[50] NYNEX Petition at p. 34.

Phase II Order.[51] In that Order, we responded to petitioners' concerns by effecting several modifications to our initial proposal. We departed from our decision to consider the state rates to be presumptively correct, deciding instead to assign them weight that we deemed appropriate following review of the state decisions and interested parties' challenges to them. We also reduced the number of state decisions that would be considered, and adopted a simple, as opposed to a weighted, average of the state rates of return. We reiterate here our finding that these actions will minimize the burdens on the carriers and the Commission, and will still provide us with useful data. To the extent that petitioner's arguments merely repeat claims considered in the *Phase II Order*, we find them insufficient to merit reconsideration of our use of state authorized returns.

37. We do find it desirable, however, to address three subsidiary arguments. In arguing against consideration of state rates of return, NYNEX states that "[s]tate rate of return authorizations are not comparable . . . and many of these differences cannot be adjusted to present all state awards on a comparable basis."[52] We reject this contention, noting that a number of LECs have made necessary adjustments in their data submissions.[53] Moreover, the lack of precise comparability goes to the weight of the estimate, not the relevance. We have already concluded that the similarity of risk and similarity of the goals in balancing investor and ratepayer interests make the collective judgment of state commissions relevant. We also reject GTE's argument that our decision not to require submission of ATTCOM's state rates of return forecloses our ability to review the LEC state rates. For ATTCOM, we were unable to conclude that the risks involved with its inter- and intrastate services are sufficiently similar.[54] Finally, we reject the NYNEX argument that all state PUCs must be included in our analysis. In the *Phase II Order* we explained that our use of an average of the state rates of return was not intended to produce an exhaustive review of state PUC rate determinations, but an estimate of the required rate of return for intrastate service. Such an estimate was found to be a valuable addition to our analysis because the record in this proceeding indicates that the level of risk associated with the provision of intrastate service is similar to that associated with the provision

[51] FCC 85-645 at paras. 25-33.
[52] NYNEX Petition at p. 34. *See also* BellSouth Petition at pp. 12-13.
[53] Southwestern Petition at p. 21 n. 28.
[54] *See Phase II Order*, FCC 85-645 at para. 4 n. 23.

of interstate service. We found that limiting our analysis to a robust sample of representative state commission judgments would reduce the evidentiary burdens on the carriers and facilitate Commission review without compromising the value of the analysis. NYNEX is free to request a waiver of our Rules to allow consideration of a particular state decision if it believes that such consideration would prove informative.[55]

38. In their procedural arguments, petitioners claim that to consider state rates of return is a violation of due process and of Section 205(a) of the Communications Act because the parties must be given an opportunity to comment on such evidence; because mere conclusions cannot be incorporated as evidence, but instead all evidence in the prior proceeding must be incorporated; or because the Rules give no opportunity to test the opinion of the state agencies or the testimony of witnesses before the state agencies by cross-examination.

39. We find these arguments to be without merit. The parties are given more than adequate opportunity to comment upon and to test the state authorized rate of return decisions incorporated into the record by Part 65. Section 65.201(a) requires submission of not just a state's mere conclusions, but the entire decision of the state in authorizing an exchange carrier rate of return. Because the state rate of return decisions are required to be submitted with the initial rate of return submissions, all participants have the opportunity to submit evidence contrary to any state decision in their rate of return submissions.

40. Petitioners' claims that they are entitled to cross-examination of either state agency members or witnesses before the state agency are similarly erroneous. Official public records and reports are not excluded by the hearsay rule regardless of the availability of the declarant for cross-examination. Federal Rules of Evidence 803(8). The Commission may officially notice the official acts or records of other governmental bodies, here embodied in the rate of return decisions of the states. 5 U.S.C. Section 556(e).[56] The parties have multiple opportunities to

[55] We note that, in the future, state PUCs may adopt regulatory approaches such as the "social contract" arrangement adopted in Nebraska. The adoption of like regulatory schemes may require that we exclude such state commissions from our computation of the average state authorized rate of return.

[56] Our citation to Section 556(e) does not indicate any conclusion regarding the type of hearing procedures applicable under Part 65, or whether notice and comment rulemaking or formal rulemaking procedures apply. Rather, what we have concluded is that under the strictest requirements, the notice provided is both permissible and adequate to include state rate of return decisions in the record.

dispute those decisions in their rate of return submissions. The parties also have multiple opportunities in their rate of return submissions and in proposed findings to comment upon and to address the weight to be given the state rate of return decisions. For the foregoing reasons, we reject petitioners' arguments and reiterate our finding that the state authorized rates of return are valuable measurements that will contribute to a complete and extensive record.

IV. THE USE OF HISTORICAL AVERAGES IN DCF COMPUTATIONS

41. The traditional or classic DCF model is based on the formula Ke = D/P + G. Under that formula,

Ke = the cost of equity;

D = the annualized dividend payment that the investor expects to receive over the next year;

P = the current price of the stock;

G = the growth rate that investors are anticipating in future years.

The classic model is based upon the assumption that the most recent information is the best information. In its purest form, P represents the stock price on a particular day, G represents the investor growth expectation on that day, and D represents dividends that will be paid during the annual period following that day. Traditionally, the measurements are averaged over a short period ot time (generally under 90 days and sometimes as few as 10 days) to smooth the effects of aberrations on any one particular day. This pure form methodology could have been replicated in the proceeding by using the last IBES forecast in a measurement period, the stock price on the date of the forecast, and the dividend for the annual period after the forecast. For example, if capital structure and embedded cost of debt were measured as of December 31, 1985, the cost of equity computations could have been based upon a December 1985 IBES forecast, the stock price on the forecast date, and the anticipated 1986 dividends.

42. In prior represcription proceedings, we have hesitated to give conclusive weight to expert opinions that are based upon a pure form DCF methodology because the methodology may give too much weight to a spot price that may not be representative of investor expectations over the period of time that a rate of return prescription will be in effect. Stock prices may fluctuate for reasons wholly unrelated to the firm's operations.[57] Investor expectations tend to fluctuate and an accurate measurement of investor growth expectations at a particular point in time might produce an end result that would be unfair to investors or stockholders.

43. Our *Phase II Order* attempted to avoid spot pricing distortions by modifying the classic DCF methodology to substitute an average of forecasts, stock prices and dividends over a two-year period that precedes the date that is used to measure capital structure and embedded debt costs.

44. Most of the petitioners object to these departures from the classic DCF model. They note that the comments that advocated the use of a DCF model suggested methodologies that were based upon the classic model and that the *Supplemental Notice* described a methodology using IBES forecasts that approximated the classic model.[58] Most petitions opposing the two-year average DCF approach allege that it is improper to input historical data into what is described as a "forward-looking" model. These petitioners argued that our reliance on two-year average data to obtain values for P, D and G was theoretically unsupportable.

45. Petitioners claim that the current price is the stock market's best estimate of the future price and that the two-year average violates a basic tenet of the efficient market hypothesis that the current price incorporates all the available relevant information about the value of the stock. GTE provides an example illustrating its argument that the two-year average price version of the DCF overstates the cost of capital when interest rates move down over the two-year test period.[59] Southwestern argues that the two-year approach treats the January/February 1984 prices of the RHCs' stock, when the companies were still being traded on a "when-issued" basis, as being as relevant to current investor perceptions of the companies' value as the

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[57] *See e.g.*, "Those Big Swings on Wall Street," *Business Week* at 32–36 (Apr. 7, 1986).

[58] All petitioners except Rochester advocated the use of a DCF model in our analysis. While Rochester did not state that use of DCF analysis was improper, it argued that a capital asset pricing model analysis was preferable.

[59] GTE Petition, Affidavit of Dr. Morin at p. 4.

current selling prices.[60] Centel argues that the two-year average methodology creates an additional and unnecessary two-year lag between financial market movements and the cost of equity capital, and that the result could be serious financial harm to customers or to the LECs.[61] Rochester states that the argument that two years of price data produce a more accurate estimate of a representative stock price than can a shorter time series is statistically invalid.[62]

46. Petitioners who argue for exclusive reliance upon the most contemporaneous estimate(s) of price do not adequately take into account the aberrations that frequently exist in market prices within particular time periods. A rapid expansion in the supply of, or demand for, a particular stock can induce enormous volatility in the prices of that security that, in terms of price effects, do not comport with theoretical notions of marginalism.[63] Aberrant price activity can be traced not only to the effects of programmed trading,[64] and margin trading, but can also result from corporate treasury purchases and sales. The presence of those factors in securities markets, as well as other market imperfections (such as insider trading), have caused us to be circumspect about adopting a measurement of price that is unique to a particular sub-interval during the period between represcriptions. In the *Phase II Order*, we adopted a measurement of price for each security that was based upon the average of the high and low prices that existed during each trading day during the two years preceding the represcription period. We continue to believe that such a measurement has considerable utility, and we will continue to use that measurement in the future. At the same time, we are aware that it is also desirable to include consideration of more contemporaneous price data without relying exclusively upon the two-year average of daily prices. For that reason, we will be requiring additional, more contemporaneous, measurements in our Part 65 Rules that utilize more recent market data.

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[60] Southwestern Petition at p. 29.

[61] Centel Petition at p. 4.

[62] Rochester Petition at p. 10.

[63] "Marginalism" is associated with incremental changes that result from movements along given supply or demand curves, as distinguished from massive shifts in the supply or demand curves themselves.

[64] "Programmed trading" refers to non-contemporaneous decisions to purchase or sell securities within particular time frames, *irrespective of price*, or upon the occurrence of a predetermined event such as the price and/or volume of a particular security within a particular time frame. *See generally*, "Those Big Swings on Wall Street," *supra* n. 56.

47. We are not persuaded that the two-year average variation should be abandoned because it represents a departure from the traditional model. Most of the petitioners do not advocate the use of the traditional model in its purest form in that they would average stock prices over a period of ten, 20, 30, or perhaps ninety days to derive the P value. This modification is desirable if the G factor is to be based upon an IBES forecast because the analysts polled did not make their forecasts on the day that the report is released.

48. We are, however, persuaded that the staleness factor detracts considerably from the value of results that would be produced by the two-year average variation. A rate of return computation that is based in part upon stock prices, analyst forecasts, and dividend payments that occurred nearly three years before the beginning of a two-year represcription period may not be an accurate indicator of the return a carrier should receive during the represcription period. We have decided that we should remedy this problem by supplementing a return computation based upon an historical model with a return computation based upon a more classic DCF model instead of substituting a classic DCF model for a model that is based upon two-year averages. It is doubtful that conclusive weight should be afforded to the results of either model. The relative weight that is given to the results of each model can be determined in a particular represcription proceeding.

49. Although we are not discarding the historical methodologies adopted in the *Phase II Order*, we agree that the procedures for computing the D factor must be revised to accomplish our purpose. The historical model should produce a composite of classic DCF computations at different points in time. An average of dividends paid over the same two-year period does not accomplish that result because it reflects dividend payouts contemporaneous with that period rather than next-period dividends. We agree that D1 must be a reasonable estimate of investors' anticipated dividend yield for the next year. We intend to require that subject companies provide a record of their earnings and dividends for each quarter of the previous two years, and the current IBES estimates (truncated mean and full mean, with associated standard deviations, and median) of earnings for next full year. The earnings and dividend records should include annotations to indicate extraordinary changes or additions to earnings, one-time dividend payments, etc. This will allow us to

calculate D1, taking into account the timing of any expected increases in dividends.[65]

50. Most petitioners who advocate a classic DCF growth model in conjunction with an IBES growth forecast have stated that some averaging of stock price information would be necessary. We agree with that suggestion, but have concluded that we should not attempt to specify in advance any particular period. Rather, we will require carriers to submit the underlying data (*i.e.*, IBES forecasts and dates, daily stock price information, etc.) that will allow us to compute various estimates depending on the averaging period. It is not possible to predict for any particular represcription the number of days that will strike the best balance between a "current" or spot price and an average or smoothed price. Carriers, of course, are free in their represcription submissions to advocate any particular averaging period and the reasons therefor.

51. We have concluded, however, that it will be necessary to invite further comment on the timing issue as regards the cutoff date for consideration in a particular represcription proceeding. There is reason to believe that the inputs into the DCF model nearest to the represcription decision would be most useful. A capital structure and embedded debt computation that is approximately contemporaneous with the IBES forecast should also be used in a two-year variation. Nevertheless, some time must be allowed to compile the information, to provide some opportunity for comment on the weight that should be given to the results, and to enable this Commission to digest the information and comments. We will determine an appropriate schedule for the submission of the underlying data to be used in future represcriptions in a supplemental phase of this proceeding.[66] Our staff has obtained some supplemental data for purposes of enabling us to use a classic DCF in Phase III. We will determine the weight to be afforded these alternative computations in the Phase III Order.

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[65] Other estimates of D1, including growing the current dividend by the growth rate, omission can also be calculated. *See, e.g.*, US West Petition, Affidavit of Dr. Litzenberger at p. 12. Such other estimates, particularly with respect to comparable firms, may prove worthwhile.

[66] We will also reexamine carrier groupings at that time and may decide to include other questions in that notice.

A. Use of IBES Projections

52. Both NYNEX and the Bell Atlantic Task Force (Task Force)[67] object to our placing reliance on the Institutional Brokers Estimate System (IBES) as a source of long term growth projections. NYNEX argues that the Commission should use a group of prominent analysts selected on the basis that: (1) they regularly publish a five-year growth forecast for each RHC; (2) they are among the top fifteen on *Financial World's* ranking of analysts by research quality: and/or (3) they rank among the top twenty of the largest investment banking/brokerages listed by *Institutional Investor.* NYNEX believes that the forecasts of prominent and influential analysts have a greater impact on the investor concensus than the analysts that are included in the IBES survey. In addition, the Task Force objects to the use of IBES growth projections because (1) the analyst's names are not disclosed; (2) the list of analysts used may vary from company to company; (3) the projections are strictly for long term growth in earnings, and do not include estimates for the growth in book value or dividends; (4) the analysts' method of estimating the long term growth rates is not revealed; and (5) the IBES estimates have been wrong in the past.

53. While we do not disagree with the contention that IBES is not the only source of analysts' estimates, we see considerable problems with designating specific analysts upon whom we would rely in a rate of return proceeding. We expressed concern in our *Supplemental Notice* that analysts not be influenced by the possibility that their projections would be inputs in an FCC proceeding. It was and is our belief that creating a list of approved analysts would exacerbate the very natural incentive of analysts to target the growth rates to what they think this Commission will or should approve rather than to concentrate on estimating the future growth potential of each company.

54. The Task Force's objection to the fact that the list of analysts reported by IBES may differ from company to company does not seem to be particularly relevant. IBES surveys a large number of well known analysts and, although the RHCs are closely followed by many of them, it may be true that the exact list following each company will vary. We fail to see, however, any particular merit in limiting our survey to only those analysts who follow all the RHCs.

[67] NYNEX Petition at p. 23; Task Force Opposition, Appendix A at p. 28.

55. The Task Force also objects to the fact that IBES does not provide growth estimates of dividends and book value per share, and does not publish the details of how each analyst arrived at his projections. We are aware that the rates of growth of earnings that are forecast by analysts are not tautologically equivalent to expected rates of growth of dividends. The task force has not, however, provided persuasive evidence showing that, in the aggregate, the expected rate of growth of earnings is not a reasonable proxy for the expected rate of growth of dividends. Moreover, the Task Force has not established, with any quantitative certitude, that the book values of the firms from whom IBES estimates are drawn bears a strong functional correspondence to the rate of growth, or decline, in dividends. As a consequence, we decline to strike the IBES growth estimates on the grounds that the Task Force advances. Thus, our use of any one particular measure of growth does not necessarily invalidate the results of that portion of the overall analysis. As to the objection that IBES does not make the analysts' studies available, we note that (1) analysts seldom make public the full details of how they arrived at particular growth projections; and (2) we do not believe that it would be a fruitful use of our limited resources to entertain continuing disputes as to the validity of methods that analysts chose to disclose.

56. Finally, the Task Force notes that analysts' forecasts have proven wrong in the past. This Commission is aware of that fact, but it believes that the evidence in the record indicates that analysts' forecasts may, at times, prove to be superior to any other projection based on historical data (the only alternative identified by the Task Force). We will, of course, consider all relevant information on growth forecasts that is provided to us, and we will, as a check on such forecasts, conduct our own studies using historical data. NYNEX and US West recommend that we use a truncated average of the IBES forecasts that eliminates the highest and lowest forecasts and calculates a simple average of the remaining analysts.[68] We believe that this may prove to be a useful estimator, but, in addition, we believe that we should examine other estimators (mean, standard deviation, and median). We therefore will require in future proceedings that the individual analysts' estimates (but not their identities) be submitted to us. In addition, as a check on any upward bias in analysts' forecasts, we will require that the truncated mean, full mean, the standard

[68] US West Petition, Attachment 1, at p. 14; NYNEX Petition at p. 25.

deviations of both means and the median estimates be submitted in conjunction with the actual earnings growth rates achieved for each quarter of the previous two years.

B. Use of an Annual Model

57. While none of the petitioners objected to our decision to continue the traditional and convenient practice of conducting our rate of return proceedings using annualized figures, all the petitions that addressed our DCF methodology objected to our method of annualizing the current divident yield (D1/P0).[69] The thrust of their basic argument is that if, for example, a company were paying a quarterly dividend of $2.50, and the current price of its stock were $100.00, so that the quarterly yield was 2.5 percent, the company should be allowed to earn somewhat more than (2.5)(4) = 10 percent on its rate base on an annual basis because it does not have use of the dividends over the entire year. This argument might be valid if the allowed rate of return were applied to the rate base in existence at the beginning of the year in determining annual revenue requirements. In that case the investor would be in a position analogous to that of a passbook saver, who knows that a dollar deposited for a year will earn more than the stated nominal annual interest rate if the bank offers quarterly instead of annual compounding. If the company's rate of return is based on the average of the beginning and ending balances of its rate base, however, then a "compounding" effect is already built into the revenue requirement calculation because a mid-year rate base is virtually always larger than a rate base at the beginning of the year. It is our intention to continue this Commission's longstanding practice of basing the revenue requirement calculation on the average of rate base outstanding during the year, therefore we reject the proposed reformulations of our DCF model to avoid in effect adjusting for compounding twice.

58. Moreover, we have decided to reject quarterly compounding because of the level of complexity that it adds to our analysis, without any corresponding increase in the accuracy of the estimates. One of the critical inputs to the model, growth, reflects growth as measured on a simple annual basis.[70] Finally, it is not

[69] We note that, while ATTCOM did not address this issue in its petition for reconsideration, it has voiced its support for an annual DCF model in the past. See ATTCOM Comments filed in the Phase II proceeding at p. 13; Reply Comments filed in the Phase II Proceeding at p. 19.

[70] Indeed, in response to the parties' petitions, we have simplified our calculation of historic growth in dividends. *Infra* at para. 64. In that context, petitioners had asserted that our attempt to measure growth based on a least squares

at all clear that the investment community utilizes the quarterly compounding refinement, particularly in light of the relative magnitude of the uncertainty surrounding selection of a growth value. Because we are utilizing market prices to estimate the return on equity, the petitioners would have to establish that analysts and investors (and not simply experts retained for purposes of this proceeding) actually utilize quarterly compounding models, and thus that use of the quarterly model affects the market price. While petitioners proffered numerous statements from analysts, none of those witnesses advocated or indicated that they utilize a quarterly-compounding growth model. Moreover, as several RBOCs have noted, their practice is to set dividends *annually*, not quarterly. In light of all the foregoing, we have concluded that use of a single-growth, annual model should be utilized in estimating required returns on equity.

V. OTHER DCF REFINEMENTS

59. Although the most fundamental objections to the DCF methodologies relate to the use of historical averages, a variety of other revisions have been suggested in the reconsideration petitions.

A. Exclusion of Flotation Costs

60. The issue of adjustments to the rate of return to compensate carriers for flotation costs (the cost of issuing capital) was introduced in this proceeding in the *NPRM*. In response, petitioners adduced a wide variety of arguments in support of a flotation cost adjustment of 50–70 basis points. In the *Supplemental Notice*, after extensive discussion of these arguments, we found that the petitioners' claims were inconsistent, speculative and inadequately supported, and concluded that only a one-time upward adjustment of 10 basis points to the LEC return on requity was warranted.

61. The petitions for reconsideration of the *Phase II Order* largely restate the arguments considered and rejected in the *Supplemental Notice*. To the extent that they do so, they will not be revisited here. Petitioners also contest our finding that the DCF methodology, by reflecting investor expectations, implicitly

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regression of eight dividends was misguided. They contended that a simple, annual growth rate better represented growth. Our other growth measures, IBES five-year forecasts, also incorporate annual growth rates. Thus, we would have to adjust these growth rates to a quarterly basis to be consistent with a quarterly model.

accounts for our denial of adjustment costs.[71] Furthermore, GTE argues that a flotation cost adjustment of 50–70 basis points cannot be recovered by a one-time adjustment, but must be a permanent addition to the carriers' costs of equity.[72]

62. We find that petitioners have not provided any additional justification for their requested adjustment that would merit different treatment of flotation costs. First, petitioners have made no showing that their actual or expected costs of issuance are five-to-seven percent of their cost of equity; rather, they assert that "[e]mpirical studies have generally quantified the flotation costs associated with the issuance of equity in the 5% to 7% range, which in turn translate to an upward adjustment of approximately 50–70 basis points to the cost of equity."[73] We will not premise our resolution of this issue on such general assertions when the actual costs of issuing securities are readily available to the carriers. In addition, as we stated in the *Supplemental Notice*, we require that any showing by the carriers on flotation costs quantify separately the direct (actual out-of-pocket expenditures) and indirect (the temporary suppression of stock price following the issuance) components of flotation costs, a showing that petitioners have not even attempted in this proceeding. Second, we reject the GTE argument that the flotation cost adjustment must be a permanent addition to the carriers' costs of equity. GTE adopts the 50–70 basis point estimate for flotation costs used by most of the other petitioners, a figure that purportedly includes both direct and indirect issuance costs. GTE therefore argues that the total cash outlay involved in issuing stock, and the temporary effects of stock price suppression, be recovered by the carriers on an annual basis in perpetuity. We find that this approach attempts to combine the elements of cost expensing and amortizing that are most beneficial to the carriers. We find that this approach is internally inconsistent and would result in a windfall to the carriers. Finally, we note that the carriers' stock is currently trading well in excess of book value, which indicates that the approach to flotation costs adopted in the *Supplemental Notice* is not unreasonable.

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[71] GTE Petition, Affidavit of Dr. Morin at p. 20.

[72] *Id.* at p. 17.

[73] *Id.* at p. 17. *See inter alia*, Centel Petition at p. 5, NYNEX Petition at pp. 26–28, US West Petition at pp. 20–21.

B. Use of Linear Regression

63. Turning to G, the long-term growth rate in dividends anticipated by investors, all the petitions objected to our G1, which was computed as the slope of an ordinary least squares (OLS) trend line of quarterly earnings. Petitioners argue that a two year trend, given that there was only a single dividend increase in that time, does not represent the long term trend required by the DCF approach for G. It is also argued that the slope of an OLS trend line based on eight data points is based on an inadequate sample size, a poor statistical fit, and a mis-specified functional form. Finally, petitioners argue that this method is quite vulnerable to changes in dividend policy. The RHCs have in the past increased their dividends only once per year. A minor change in the timing of an annual dividend increase could result in G1 that includes anywhere from one to three dividend increases or decreases in its two-year trend.

64. We have concluded that the ordinary least squares trend line measurement that we have utilized for G1 introduces unnecessary complexity into the measurement of the historical rate of growth that actually occurred in dividends during the two-year period that precedes each represcription filing. As a consequence, we have concluded that we should utilize a more simple measurement, defined as (D2/D1) - 1 to measure G1, where D2 is the sum of the dividends that were paid during the second year of the two-year interval that precedes the represcription filing and D1 is the sum of the dividends that were paid during the first year of that period. We have also concluded that we should not consider measurements of growth for G1 that are based upon differences between the first and last quarters of the two-year interval preceding the represcription. Our reason for this conclusion is based upon the fact that: (1) those two data points may reflect anomalous dividend payments; and (2) that other dividend payments within that interval may be increased, decreased, or missed in their entirety. Finally, we note, in response to those who contend that the actual rate of growth (or decline) of actual dividends is irrelevant, that the past can provide a guide, albeit at times imperfect, to the future. To not consider data of actual growth rates would place this Commission in the position of relying exclusively upon the conjecture of interested parties, a circumstance that may not always be consonant with the public interest.

VI. COMPARABLE FIRMS ANALYSIS

65. One of the approaches we adopted for estimating the carriers' interstate costs of capital was to rely on a series of financial screens to identify firms exhibiting risk characteristics comparable to the jurisdictional activities of the carriers. Under this approach, we can estimate capital costs for the regulated interstate operations by using financial screens tailored to the jurisdictional activities. Thus, we specified several general risk criteria (*e.g.*, bond ratings, stock exchange listings) and also set forth accounting measures that would capture the volatility (and hence business risk) of the regulated interstate operations. The parties criticized several specific aspects of our comparable firms approach, and we respond to those criticisms below. While not agreeing with all of their complaints, we do recognize that additional refinement may very well improve the accuracy of these estimates. We intend to undertake efforts to refine our methodology prior to the next represcription. For purposes of Phase III of this proceding, however, we will take into account carrier criticisms in evaluating the weight to attach to these estimates.

A. Exchange Carriers

66. *Section 65.400(d).* Several exchange carriers contend that the AA debt rating screen induces a conservative bias because some exchange carriers have debt ratings that are less favorable than AA. Parties making those contentions have not fully taken into account the fact that we are not attempting to set a cost of capital on the basis of the total risk (unregulated, regulated at the intra-state level, regulated at the interstate level) that exists for each exchange carrier, but rather the risk that is associated with interstate exchange access for the exchange carrier industry as a whole. Because no party has provided quantitative evidence that establishes that the financial risks that are associated with interstate access services are greater than those corresponding to an AA debt rating, we will deny those portions of petitions that seek reconsideration on that ground. We will, however, in future proceedings consider quantitative evidence that is directed to determining the debt rating that should most properly be associated with the financial risks that are incident to the provision of interstate exchange carrier access services.

67. *Section 65.400(e).* Many exchange carriers seek reconsideration of those portions of our Rules that establish screens on the basis of risk measurements that are tied to time series data for revenues and expenses. With respect to sections 65.400(e)(1)-(2), some petitioners have contended that a conservative bias is introduced by only including those firms with detrended coefficients of variation that are less than or equal to the coefficients of variation that are derived from NECA common line pool data. Ideally, those risk screens should be set at a level that is identical to (*e.g.*, neither less than, nor greater than) the coefficients of variation that are determined from the NECA pool data. However, for the initial prescription under these Rules, we were and are mindful of the unusual data variations that were being experienced in the exchange carrier industry as NECA and exchange carriers improved the quality of the data that were reported in the aftermath of divestiture and the development of initial reporting systems to implement this Commission's access charge rules. As a quantitative matter, we believe that our initial decision to use a "less than, or equal to" inclusion screen properly moved in the direction of offsetting aberrations in NECA data that resulted during the 1984-1985 time period.[74]

68. Several petitioners have also contended that the choice of NECA common line pool data is, in the first instance, an inappropriate body of data from which interstate exchange carrier access risks may be measured since it does not incorporate the election of some carriers not to pool their interstate traffic-sensitive operations. We are not persuaded by this contention for two reasons. First, the business risk that is associated with the common line pool is, in large measure, tied to the aggregate number of switched access minutes which, in turn, accounts for the bulk of the revenues that are derived from the common line pool. The aggregate number of switched minutes that are reported by exchange carriers for common line revenue requirements bear a functional correspondence, in the aggregate, to the switched minutes that form the basis for interstate compensation for the use of traffic-sensitive plant. Second, efficiently managed exchange carriers that have concluded that they should withdraw from the traffic sensitive pool have presumably also concluded that withdrawal from the traffic sensitive pool results in *less* risk

[74] For future periods, however, we look forward to the presentation of evidence that clearly establishes the number of firms that should be included in the set of firms that have business risk that is comparable to the risks that are exhibited by variations in the NECA common line pool.

to their shareholders. Once again, no petitioner has provided convincing quantitative evidence to the contrary.

69. Some parties also contend that data variations resulting from "seasonality" introduce bias into the measurements of business risk. No petitioner has, however, explained why seasonal variations in business risk should not be included in measurements of the overall risk that is associated with the provision of interstate access services. The "seasonal" component of interstate exchange access services is as much an intertwined component of interstate exchange access as are other components. Several parties also make conclusory assertions that variations in the application of accounting rules among firms results in data that are not comparable. No petitioner has, however, clearly established that those asserted differences are sufficiently significant to invalidate comparisons among firms.[75]

70. Finally, some parties also assert that the mathematics that are associated with our coefficient of variation measurements render that measurement useless. We are not convinced that the business risk that is associated with interstate exchange carrier operations is not directly related to the predictability of the revenue and expense streams that are associated with the provision of those services. The measurement that we have employed calculates the dispersion (variation) over time that results from whatever linear trend is discernible in those time series data. Scale effects are then removed by dividing the observed composite variation by the average of the time series. We thus believe that the coefficient of variation that we have specified is an unbiased measurement of the predictability of the revenue and expense streams that have been associated with the provision of interstate exchange access services.[76]

B. ATTCOM's Cost of Interstate Capital

71. *Section 65.500(c)(2)-(3).* Aside from contentions that relate to the measurement of dividends and growth that have been

[75] We intend to revisit these issues as part of our refinement prior to the represcription for 1989-1990.

[76] Some parties also contend that it is inappropriate to examine the predictability of the revenue stream, and the expense stream, independently of each other, and establish screening criteria on that basis. While we do not agree with that contention because the risk measurements that we have specified address the underlying nature of the business risks of interstate exchange access services, we have also concluded that we should probably employ a coefficient of variation of net operating income or some other similar measure as an additional screen. We will continue to refine our comparable firms screening techniques prior to our next represcription.

addressed elsewhere in this order, ATTCOM's principal concern relates to the screening criteria that were specified for determining groups of firms that may be considered to be similar in risk to ATTCOM's interstate interexchange common carrier services.[77] In brief, ATTCOM requests that we eliminate the coefficient of variation screens that are based upon ATTCOM Interstate Monthly Report No. 1.[78] ATTCOM supported its contention by stating that coefficient of variation methodologies should only be applied to operating income, and not to components thereof.

72. We are not persuaded that there are no insights to be gained from using screens that are based independently upon the predictability of AT&T's interstate revenues and the predictability of ATTCOM's interstate expenses, and accordingly decline to strike those provisions from our Rules. As in the case of the exchange carriers, however, we are persuaded that additional insight will be gained from measuring the coefficient of variation of interstate operating income (in this case from ATTCOM's Interstate Monthly Report No. 1 and such subsequent reports as this Commission may prescribe) as an additional screen to be used in addition to the coefficient of variation screens that are derived from ATTCOM's monthly interstate data.[79]

73. Finally, we will permit ATTCOM to introduce evidence in the next proceeding that demonstrates why banking and financial institutions (and not other firms in other industry groupings) should be excluded from the universe of firms from whom firms

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[77] We will not discuss here issues that have been raised by AT&T that have been addressed elsewhere in this Order in response to concerns that have been expressed by exchange carriers. We note that the post-divestiture period for AT&T also resulted in anomalous data variations.

[78] *See Phase II Order* at para. 54 n. 104; Section 65.500(c)(2)-(3) of the Commission's Rules, 47 C.F.R. (to be published at 65.500(c)(2)-(3).

[79] Pursuant to Section 65.500(d) of the Commission's Rules, we here so provide. The coefficient of variation that ATTCOM is to employ for all applicable data series under Section 65.500(c) of our Rules, as well as the net revenues screen that we establish here, is the standard deviation about the ordinary least squares trend line divided by the average of the data series. "Net Operating Income" is defined as measured on line 23 of ATTCOM's Interstate Monthly Report No. 1 for the month of April, 1986. The Chief, Common Carrier Bureau is delegated authority to redefine that measure in light of changes in accounting and other regulatory treatments that may be either necessary or desirable to provide meaningful and useful data. ATTCOM also contends that five years of data should be used. Whatever merit that contention might otherwise have, ATTCOM has only generated post-divestiture interstate data from the first part of 1984, with the consequence that five years of interstate data are not available. *See* ATTCOM Petition at p. 9. As with the exchange carriers, we will also permit ATTCOM to introduce evidence that attempts to "center" groups of comparable firms in addition to complying with the "less than or equal to" screening criterion. *See* para. 67 *supra*.

with risks that are similar to ATTCOM's interstate interexchange operations are to be determined. It may be possible to develop additional screens or modified screening criteria that will produce a more representative group of comparable firms. We will be devoting further study to this subject.

74. In conclusion, we should note that we do not view any specific methodology that has been adopted or proposed as conclusively determining the measurement of any carrier's interstate cost of capital. In the final analysis, judgment will always be required in determining the weight that should be applied to each measurement in each time period. The fact that no totally perfect, unambiguous, or unmanipulable measurement now exists, or possibly will ever exist, does not invalidate a judgment that takes cognizance of, and encompasses, those imperfections.

VII. THE CAPITAL ASSET PRICING MODEL

75. A number of petitioners recommended the capital asset pricing model (CAPM) as a check method on our DCF estimates for the RHCs, and as a replacement for our comparable firms analyses for the RHCs and ATTCOM.[80] Ameritech states that the DCF and CAPM methods are both widely-accepted models and, because they employ very different approaches to estimating the cost of equity capital, they complement one another as cross-checks.

76. While the DCF approach directly measures the return that investors in a company's stock are requiring, the CAPM approach first calculates the risk that investors are bearing by holding that stock and then determines the current rate of return investors can expect for bearing that amount of risk. The CAPM formula is:

$$Ke = rf + Beta\ (rm - rf)$$

Under this formula:

Ke = the cost of equity;

rf = the current return an investor could earn with the minimum risk (for example Treasury bills);

Beta = a measure of the risk exposure of an investor holding the company's stock—measured relative to risk of holding a well

[80] GTE Petition, Affidavit at p. 23; Southwestern Petition, Statement at p. 9; US West Petition, Attachment 1 at p. 21; Ameritech Petition at p. 15; and Rochester Petition at p. 15.

diversified portfolio of common stocks. If a company's beta is equal to one, then the investors expect the stock to have about the same variance in return as the diversified portfolio of stocks;

rm = the expected rate of return for investors holding the diversified portfolio of common stocks.[81]

77. As with the DCF formula, the CAPM formula has three variables to be determined. The risk free rate (rf) is estimated simply by taking the current yield on short-term U.S. Treasury bills. The appropriate value for Beta can be determined in a number of ways. GTE and US West recommend a number of widely used sources of prominent independent analysts' estimates of the forward-looking Betas.[82] The final variable is rm - rf, the difference between the expected rate of return on the well diversified portfolio and the risk free investment. Normally this variable is estimated using historical data.[83]

78. Several petitioners recommended that we replace our comparable firm screens by using analysts' estimates of Beta to select comparable firms. NYNEX and US West recommend a three-step analysis that would be applicable to both AT&T and the RHCs. First, a large sample of publicly traded companies would be used to estimate the relationship between market-based risk measures (analyst's Beta estimates) and accounting-based risk measures. Second, the resulting relationship between Beta and the accounting risk measures would be used to estimate the Beta implied by the various accounting-based risk measures of AT&T's interstate and the RHCs' interexchange access business. Third, the resulting Beta would be used in conjunction with the above CAPM formula to determine the required return on interstate carriage and interexchange access.

79. While these recommendations have some merit, and we will consider incorporating CAPM analyses into our rules in the future, it would be premature to attempt to adopt that method at this time. As NYNEX and US West note, the limited period of time since divestiture makes it difficult to develop reliable accounting estimates of risk. In addition, we would require a more

[81] The *expected* return, or cost of equity, in the diversified portfolio presents the same problems of measurement that we considered in the DCF methodology and its variant forms. *See Phase II Order* at para. 35; Ameritech Petition at p. 15 & Attachment B at p. B-1.

[82] *I.e.*, BARRA, Prudential Bache, Vestik, and Wells Fargo.

[83] Slightly different versions of the CAPM formula were proposed by the various parties in the *Supplemental Notice*.

extensive record than we now have before adopting a specific formulation of the CAPM approach.

VIII. FILING REQUIREMENTS AND DEADLINES

80. Objections have been raised to the first sentence of Section 65.102(a), which provides that "only those rate of return submissions permitted or required by Part 65 shall be considered in proceedings to determine the authorized rate of return for interstate services." Petitioners question whether evidence other than data prescribed by Part 65 can be excluded. We did not intend to exclude relevant evidence other than the prescribed data from the record. We adopt the proposal of Bell South and amend Rule 65.102(a) to reflect our intention to permit participants to include relevant evidence in addition to prescribed data in their rate of return submissions, as long as page limitations are not exceeded. That principle has been implemented in Phase III of this proceeding. Several carriers have been granted waivers to submit additional material.[84]

IX. ORDERING CLAUSES

81. Accordingly, IT IS ORDERED, that pursuant to 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 213, 215, 218, 219, 220, 403 and 405 and 47 U.S.C. § 553, the *Phase II Order* adopted in this proceeding is modified to the extent set forth in this *Memorandum Opinion and Order on Reconsideration.*

82. IT IS FURTHER ORDERED that the petitions for reconsideration of the *Phase II Order* ARE GRANTED to the extent described in this Order and are otherwise DENIED.

83. IT IS FURTHER ORDERED that the petitions to exceed page limitation filed by Southwestern Bell and NYNEX, and the petition to accept late filed pleadings filed by the Bell Atlantic Task Force ARE GRANTED.

84. IT IS FURTHER ORDERED that Part 65 of this Commission's Rules is amended as set forth in Appendix B of this Order, effective October 1, 1986.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[84] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, Mimeo No. 4196, released May 1, 1986).

*Appendix A - may be seen in FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

Statement of Commissioner Mimi Weyforth Dawson Dissenting in Part and Supporting in Part to the Phase II Order and Supporting the Phase III Order

Re: Authorized Rate of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers (CC Docket No. 84-800, Phase II Reconsideration and Phase III Order)
August 7, 1986

I dissented in the Phase II Report and Order to the placing of all the local exchange carriers into a unitary rate of return group for 1987 and 1988. I will dissent to that portion of the reconsideration order which affirms this unitary grouping approach. I believe that the local exchange carriers face different and unshared financial risks. These carriers have or are subject to different bypass risks, different economic conditions, different capital structures, different bond ratings, and different geographic and demographic conditions. It should also be clear that these differences will increase rather than decrease over time. Additionally, the movement away from mandatory pooling as reflected in the Unity 1-A proposal undercuts a grouping methodology. Even now only slightly more than half of the exchange carriers' interstate access revenue requirements are pooled.

I further believe that separate rates of return for the major local exchange carriers are administratively feasible. In calculating a composite DCF rate of return for the major exchange carriers the data necessary to compute individual rates of return are employed. Therefore, with some refinements of the methodology in the further proceeding, a non-unitary approach would appear to be adoptable.

Having said that, let me emphasize that I fully endorse the Reconsideration's clear statement to revisit the groupings issue in the further proceeding on rate of return methodologies.

I also dissented in the Phase II Report and Order to the use of state intrastate averages as one indication of what an appropriate interstate access rate of return should be for the local exchange carriers. While I do note that the Phase III order gives this methodology relatively little weight, I nevertheless remain concerned over the future use and weight of this methodology. I will therefore dissent to that portion of the item which affirms the use of state averages.

I believe that the classic DCF methodology developed in the Phase II Reconsideration and which employs relatively recent data generates the best starting point for determining what an appropriate cost of equity should be for the local exchange carriers for the 1987/1988 rate of return period. Further, growing the D and using an IBES determination for G are important modifications to the DCF calculation which will help produce more reliable cost of equity estimates. While the historical and comparative firm DCF models may be somewhat useful after further refinement for the next prescription period, they do not produce particularly reliable numbers for our current determination. The 1984 and 1985 period has been one of great change and turbulence in the industry and in the marketplace. Thus, giving the numbers that these historical methodologies generate relatively little weight is entirely appropriate.

As the Phase III order indicates, the weighting of various quantitative factors is not an easy task. Any projection merely reflects our best judgment. Recent trends must be given substantial but not absolute weight. The cost of equity numbers generated by first quarter 1986 or fourth quarter 1985 data must be massaged by other cost of equity calculations.

However, I firmly believe that the substantial weighting of a single month, March 1986 in the Phase III item, may give too much weight to a spot price that does not reflect investor expectations for a future prescription period. Stock prices may fluctuate for reasons wholly unrelated to the firm's operations and an unfair result could be produced. Giving equal weight to both the first quarter 1986 and March 1986 "double counts" the March data. I would therefore given the cost of equity numbers generated by the March 1986 data less weight than found in the item.

Qualitative factors must also be considered and weighed. For the local exchange carriers we must evaluate bypass, competition, technological obsolescence, inadequate depreciation reserves, the need to manage three rate of return elements, tax law uncertainties and the riskier business of providing interexchange access rather than intrastate service. I believe in particular that the item may underemphasize this last qualitative factor. For AT&T we must weigh several of the same factors and also consider the state of competition in the provision of interexchange services. Most qualitative factors warrant upward adjustments in the cost of equity and rate of return for both the local exchange carriers and AT&T.

Overall, I believe that our Phase III decision carefully balances the interests of carriers and ratepayers. While I may have preferred a slightly higher cost of equity figure for the local exchange carriers, I do believe that the carriers have been authorized a fair return on equity. This cost of equity is several percentage points above the level provided by risk free investments and will certainly enable the carriers to obtain equity investors as they modernize and expand their existing networks. However, as stock prices have risen and interest rates have fallen, it is only fair that the substantial savings recognized by the carriers in generating capital be flowed through to users of interstate access in the form of lower rates. Because of this decision the revenue requirements of the local exchange carriers will fall about $525 million. AT&T's revenue requirement will separately fall nearly $100 million. Thus, AT&T's MTS rates, and those of the OCCS, should fall. While the exact amount of the rate decreases will be determined in other proceedings, I am confident that ratepayers will be directly and substantially benefited by this decision.

The calculated costs of debt and equity, the approximately 120 basis point spread in the costs of equity between AT&T and the local exchange carriers, and the prescribed rates of return are all fair and clearly within the zone of reasonableness. Therefore, except as to groupings and the use of state averages, I support and concur in the items.[1]

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[1] The weighted average cost of capital calculations for cost of debt, cost of equity and rate of return using the most recent data available is, in round numbers, as follows:

	LECs	*AT&T*
Cost of Debt	8.8	7.47
Percentage Debt	41	41
Cost of Equity	14.24	15.44
Percentage Equity	59	59
Weighted Cost of Debt	3.6	3.1
Weighted Cost of Equity	8.4	9.1
Rate of Return	12.0	12.2

Notice of Inquiry
Scrambling Devices
Signal Scrambling

Notice of Inquiry adopted into scrambling of satellite television signals and access to those signals by owners of home satellite dish antennas. Commission's objective is to develop a broad and detailed record concerning scrambling.
—*Scrambling of Satellite TV Signals*
Gen. Docket No. 86-336

FCC 86-355

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas	Gen. Docket No. 86-336

NOTICE OF INQUIRY

Adopted: August 7, 1986; Released: August 19, 1986

BY THE COMMISSION:

I. Introduction

1. The scrambling of satellite television signals has marked the beginning of a new chapter in the direct delivery of video programming from satellite to home. There has been considerable concern regarding the continued availability of satellite signals to owners of home satellite receiving antennas and the prices that might be charged for access to those signals. Currently, more than 1.3 million households have home satellite dishes (HSDs).[1] Organizations of dish owners, dish retailers, and members of Congress have called for examination of the scrambling issues.

[1] See First Communications Group. *The Home Satellite State of the Industry Report*, Jan., 1986 at 7. The total is 1,345,000 at the end of 1985. It is likely to be somewhat higher today.

The Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Energy and Commerce Committee has held two hearings on the subject, on March 6, 1986 and on June 12, 1986. At the second hearing, it was agreed that the Federal Communications Commission (FCC) and the National Telecommunications and Information Administration (NTIA) would conduct a thorough examination of the terms and conditions under which satellite programming is being scrambled and offered to HSD owners. This *Notice of Inquiry* is the first substantive step in that inquiry.

2. Our objective is to develop a broad and detailed record concerning scrambling. We wish to examine, *inter alia*, the scrambling timetables of the various satellite-delivered channels, the price and availability of descrambling equipment, the degree of competition for HSD owners patronage, both intermodel (*i.e.*, HSD v. broadcasting v. cable v. videocassette recorder) and intramodel (*i.e.*, rivalry among satellite-distributed premium channels such as Home Box Office and Showtime/The Movie Channel and rivalry among basic cable services), the prices and marketing arrangements for providing these services to HSD owners, the public benefits from scrambling, any legal issues associated with Commission authority in this area, and any issues regarding the availability of the "network feed" of the three national commercial broadcast networks directly to HSD owners. In response to this *Notice*, we hope to receive comments on these and any other issues deemed to be relevant, from as wide a range of commenters as possible. Not only will this allow us to decided what if any Commission action is appropriate, but also it will provide a wealth of useful information to the Congress. After a brief recapitulation of the history of domestic satellite communications, we turn to a more detailed discussion of these issues.

3. In a companion item, also adopted today,[2] we are initiating an inquiry on measures to aid in locating the source of unauthorized interference with satellite and other signals, as exemplified by the so-called "Captain Midnight" episode. In that instance, an unidentified party overrode the HBO satellite feed with a message protesting the price that HBO had announced for HSD subscribers.

[2] *Notice of Proposed Rulemaking and Notice of Inquiry* in Gen. Docket No. 86-337. Adopted August 7, 1986. This inquiry is also in response to a Congressional request.

II. Background

A. Domestic Satellites[3]

4. The first domestic communications satellites were launched only twelve years ago, in 1974. In 1965, ABC had applied for a license to own and operate its own nationwide satellite communications system, as an adjunct to its broadcast network. Although the Commission returned the ABC application, it did issue a *Notice of Inquiry* in Docket 16495,[4] to explore the new policy and legal questions raised by the application. In 1970, the Commission decided that it did indeed have the authority to authorize domestic communications satellites and that it was in the public interest to do so. The Commission also announced application procedures.[5] At the same time, it issued a *Notice of Proposed Rulemaking* to seek comment on the technical or economic conflicts, if any, which exist or may arise between applicants in this area, and what policies are called for in light of any claimed conflicts.[6] By 1972, the Commission has received several applications for satellite licenses. The *Second Report and Order* in Docket 16495 announced certain conditions on the applicants and invited them to indicate if they were interested in pursuing their applications under those conditions.[7] At that time there were proposals before the Commission for satellite television program transmission, but they were characterized as "tentative and uncertain."[8] The major proposals that the time were for long-haul switched services by common carriers.

5. The regulatory regime in place at this point also included tight regulation of receive-only earth stations. These installations were licensed facilities. This meant that applicants had to make various financial and legal showings, as well as to undertake frequency coordination to avoid interference. Additionally, the authorization was a two-part process, involving a construction permit and then a license. As a consequence, earth stations were licensed to common carriers for multiple users.

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[3] Some of the information herein is drawn from Science Policy Research Division, Congressional Research Service, Library of Congress. *United States Civilian Space Programs*; Volume II: *Applications Satellites*. Prepared for the Subcommittee on Space Science and Applications of the House Committee on Science and Technology. 98th Cong., 1st Sess. 120–144 (Comm. Print 1983).

[4] 31 Fed. Reg. 3507 (1966). See also *Supplemental Notice of Inquiry*. 31 Fed. Reg. 13762 (1966).

[5] *Report and Order* in Docket 16495. 22 FCC 2d 86 (1970).

[6] 22 FCC 2d 810, 811 (1970).

[7] 35 FCC 2d 844 (1972).

[8] *Id.* at 845.

6. The next milestone in satellite communications was reached in 1975, when the Commission authorized construction of the first earth station for *private* use.[9] Florida Cablevision received permission to construct an earth station for its Fort Pierce, Florida cable system. The purpose was to receive programming from Home Box Office (HBO). HBO was the first cable network to utilize satellite distribution, beginning its transmissions in December of 1975.[10] Some satellite master antenna systems also receive HBO via satellite. In 1976, Southern Satellite Systems was authorized to operate as a common carrier and to retransmit, over leased satellite facilities, the signal of WTCG-TV (now WTBS). That station, an Atlanta independent, became the first so-called "superstation". Southern Satellite Systems began relaying it to cable television systems in December 1976.[11]

7. Also in 1976, the Commission issued a declaratory ruling regarding the size of earth stations.[12] In the *First Report and Order* in Docket 16495, the Commission had enumerated certain performance criteria that earth stations had to meet in order to be licensed. Among them was a 9 meter minimum size criterion. In the declaratory ruling, the Commission indicated that the 9 meter criterion was not an absolute minimum, but had been adopted more or less as a rule of thumb to ensure that the actual performance standards for earth stations would be met. The declaratory ruling indicated that antennas as small as 4.5 meters could be caceptable and clarified the technical showing needed in order for such antennas to be licensed. However, in spite of a petition from the Community Antenna Television Association,[13] the Commission continued to require that each earth station be individually licensed.

8. The Commission made licensing of television receive-only earth stations voluntary in 1979.[14] Licensed earth stations continue to be subject to frequency coordination and continue to receive interference protection. Unlicensed ones receive no interference protection, (*i.e.*, they are secondary to the other user of this frequency band—point-to-point microwave), but they are exempted

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[9] 54 FCC 2d 881 (1975).

[10] National Cable Television Association. *Satellite Services Report*, (Feb., 1986).

[11] *Id.*

[12] 62 FCC 2d 901 (1976).

[13] *Id.*, at 920.

[14] *First Report and Order* in CC Docket No. 78-374. 74 FCC 2d 205 (1979). Satellite earth stations used for international communications, however, remain subject to regulation. *Id.*, at 218.

from the engineering, legal, and financial showings required for licensing.

9. This deregulation of receive-only earth stations made it possible for the HSD to develop. In late 1976, the Commission had commented upon the "rapid growth in the number of earth stations placed into operation," by which it meant that, during the previous year or so, "over a hundred" earth stations had been authorized for video program distribution purposes.[15] After the 1979 decision authorizing smaller, lower-cost, unlicensed antennas, sales of HSDs began to climb. One source in the trade press indicates that 4000 were sold in 1980, with sales rising steadily to 625,000 in 1985.[16] This source indicates that there were no HSDs prior to 1980 and a total of 1,345,000 in use by the end of 1985, representing 1.6 percent of television households in the United States. While there may in fact have been a few households with HSDs prior to 1980, we believe that the figures cited provide a reasonably accurate picture of the HSD market's growth.

10. There are today a large number of program channels distributed via satellite. The National Cable Television Association lists 51 video, 11 text, and 11 audio channels.[17] A trade publication lists 72 separate satellite services.[18] None are audio, but some may be text. Six of the services have more than one satellite "feed". The length of the programming day varies across services; not all of them transmit for 24 hours per day.

11. The Commission has also authorized a Direct Broadcast Satellite (DBS) service,[19] and issued construction permits to several applicants. At present, none of them are providing service.

12. The figures cited in the previous paragraph do not include the satellite "network feed" that ABC, CBS, and NBC each use to transmit network programming to their broadcast station affiliates for subsequent terrestrial transmission. Until a few years ago, the networks delivered their programming to affiliates over land lines, generally leased from AT&T.[20] Now they use satellites for this purpose. ABC and CBS use the same portion of the spectrum (the C band) that the cable services use, while NBC

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[15] 62 FCC 2d 901, 911 (1976).

[16] First Communications Group. *The Home Satellite State of the Industry Report*, Jan., 1986 at 7, 15. This source apparently equates total sales and sales to households. Hence, these figures do not provide a breatkdown of commercial and residentail ownership of satellite dish antennas.

[17] National Cable Television Association. *Satellite Services Report*, Feb., 1986.

[18] First Communications Group. *The Home Satellite State of the Industry Report*, Jan., 1986.

[19] See *Report and Order*, in Gen. Docket No. 80-603. 90 FCC 2d 676 (1982).

[20] See para. 78 *infra*.

uses the Ku band.[21] The network feed of the former two thus can be picked up directly by HSD owners; that of NBC generally cannot. The network feeds differ in some respects from the cable channels. For that reason, the two will be discussed separately below.

13. The cornucopia of satellite service, along with the rapid drop in HSD prices,[22] has been a tremendous boon to rural America. The other major video delivery systems—broadcast and cable television—required a reasonably densely populated area to support them.[23] Satellite transmission has brought independent television stations, round-the-clock news, children's programming, cultural features, minority programming, and sports to remote and not-so-remote areas that previously had severely limited video and other entertainment opportunities. Furthermore, as the foregoing list indicates, the satellite has enabled rural Americans to keep in touch with the latest political and economic developments, and with events that affect them in their daily lives and as voting citizens.[24] Satellite transmission have made it possible for a segment of our population long underserved to attain video parity with the residents of our largest urban centers. This important result comports with our mandate to "make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[25]

B. The Cable Communications Policy Act of 1984

14. The 1984 amendments to the Communications Act were primarily designed to "establish a national policy concerning cable communications," but provisions relating to satellite-delivered programming and HSDs were also included in it.[26] Prior to the

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[21] The C band is 4/6 GHz and the Ku band is 12/14 GHz.

[22] One source estimates that in the last ten years, HSD equipment has fallen in price from $100,000 to $1,000-3,000 for antennas that can receive all domestic satellites. Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner" Before the Subcommitte on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (March 6, 1986). Prepared statement of Richard L. Brown, Counsel to Satellite Television Industry Association, Inc. (SPACE) at 3.

[23] The videocassette recorder (VCR), however, is far less dependent on population concentrations. There are tape rental outlets in very small towns and mail rental is also possible.

[24] We note that both information and entertainment are also available to the rural population via the audio and print media.

[25] Communications Act of 1934, as amended. See 47 U.S.C. Sec. 151.

[26] These provisions appear in Sections 601 and 705 of the Communications Act of

adoption of the 1984 amendments, Section 605 of the Communications Act prohibited the unauthorized interception and disclosure of radio communications.[27] When the Commission made receive-only earth station licensing optional, it affirmed that

> Signals transmitted over existing domestic satellites are radio communications intended for a specific audience, not for the general public. Hence we conclude that the protections of Section 605 remain applicable to existing domestic satellite communications. (citation omitted)[28]

This analysis was presented in the course of rejecting arguments for compulsory licensing of receive-only earth stations in order to facilitate enforcement of Section 605.

15. This finding left HSD owners in a questionable position. Satellite programmers in general did not wish to market directly to HSD owners.[29] Even though some owners contacted satellite programmers, offering to pay for their signals, these offers were not accepted, nor was permission given to view the satellite channels for free. While satellite programmers made little effort to enforce the Section 605 prohibitions against HSD owners, some of those owners may well have been in violation of that section.

16. In order to clarify this situation, the Congress amended Section 605. The new Section 705 creates an exception to the prohibitions against unauthorized interception and disclosure of radio communications. It provides that these prohibitions shall not apply to "satellite cable programming for private viewing," provided that

> (1) the programming involved is not encrypted; and
> (2)(A) a marketing system is not established under which—
>
> (i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and
>
> (ii) such authorization is available to the individual involved from the appropriate agent or agents; or
>
> (B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming have obtained authorization for private viewing under that system.[30]

1984, as amended. These sections are codified at 47 U.S.C. Sec. 521 and Sec. 605.

[27] The Cable Communications Policy Act of 1984 modified Section 605 and redesignated it as Section 705 of the Communications Act. However, this section remains codified at 47 U.S.C. Sec. 605.

[28] 74 FCC 2d 205, 216 (1979).

[29] Doubt has been expressed about whether the programmers' distribution rights included the HSD market.

[30] Section 705(b). Codified at 47 U.S.C. Sec. 605(b).

The amendments define "satellite cable programming" as video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;[31]

Thus it is clearly lawful for programmers to scramble their signals and to charge for access to them. The law does not impose specific requirements regarding the mode of retail distribution of satellite cable programming, nor does it contain any provision for regulation of the rates charged HSD customers.

17. With this background, we now turn to a detailed examination of satellite television programming scrambling and distribution. We begin with "cable channels," and then examine the network feeds separately.[32] Following that is a section of legal issues that cuts across the cable channel and network feed categories. Among those issues are the Commission's authority to regulate in this area, should we decided that is in the public interest to do so, the applicability of the Section 705(b) exception to the network feed, and the effect of copyright laws on the scrambling of superstations.

III. The Satellite Cable Channels

A. Introduction

18. We shall review the impact of scrambling on the availability of cable channels under three headings. First, we shall examine the development, price, and availability of descrambling equipment. Second, we shall consider competition for the patronage of HSD owners. We wish to determine not only what alternative delivery systems are available to HSD owners (*e.g.*, broadcast television, cable television, VCRs), but also the degree of competition *among cable channels and their distributors*. In this regard, the marketing and distribution plans in place at this time or announced will be of great interest.

19. Our third area of interest is the potential benefits to the public from scrambling. The general principles underlying copyright law suggest that creators of intellectual property are entitled to control over its use. However, the key issue from the viewer's point of view is whether scrambling can, by increasing

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[31] Section 705(c)(1). Codified at 47 U.S.C. Sec. 605(c)(1).

[32] There are also some satellite video channels that are neither "cable channels" nor network feed. These include, *inter alia*, SelecTV (distributed to hotels), some channels with sexually explicit programming, and some programming aimed exclusively at HSDs, and not offered to cable systems.

the financial return to production of new programming, serve the public interest by promoting high-quality, diverse video fare.

B. Descrambling Equipment

20. The M/A Com Videocipher II[33] appears to be the scrambling system of choice for cable channels. M/A Com states that 19 programmers have announced plans to use that system and that six others have announced scrambling plans without committing to a particular system.[34] The 19 include virtually all of the major premium and basic cable channels. The National Cable Television Association lists 23 cable channels with scrambling plans, claiming that all of them will use the Videocipher II system.[35] The NCTA and M/A Com lists overlap heavily but are not identical.

21. Some have asserted that the public interest would be served if descrambling equipment is available to viewers at reasonable prices. It does seem desirable that a standard scrambling system be adopted by the industry, in order to spare viewers from acquiring more than one decoder to obtain a full range of programming.[36] These goals may well be accomplished by the marketplace, without government intervention. In order to assess the likelihood of this happening, we wish to inquire into the development of the M/A Com system, the extent of its adoption by programmers, and the degree to which it is compatible with HSDs.

1. Development of the System

22. In testimony before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Energy and Commerce Committee, HBO and M/A Com representatives gave the following account of the development process.[37] The M/A Com

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[33] General Instrument Corporation has just announced an agreement to buy the M/A Com division that produces the Videocipher II equipment. See *Communications Daily*, Aug. 7, 1986 at 3.

[34] Letter to Hon. Timothy Wirth, Chairman on Telecommunications, Consumer Protection and Finance, Committee on Energy and Commerce, U.S. House of Representatives from Jeffrey Krauss, Vice President Corporate Affairs, M/A Com Development Corporation (Apr. 22, 1986).

[35] National Cable Television Association. *Fact Sheet on Scrambling Cable Television Signals* (Apr. 30, 1986).

[36] We note that in this case, as in all others, technical innovation may over time dictate a change in the standard. For example, it is possible that the video portion of the television signal will change from analog to digital. This would reduce the cost of digital encryption for the video signal. In that event, there would be strong incentives to abandon the Videocipher II's analog encryption of the video signal.

[37] Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish

system was developed under contract to HBO. After HBO had accepted the initial proposal, it required M/A Com to modify it in various ways. In order to reduce the price of the equipment, HBO required a simplification in the system (changing from digital to analog encryption of the video signal). HBO also required design changes to make the equipment compatible with ninety percent of existing HSD receivers, up from the initial level of 50 percent. HBO has also required M/A Com to license its technology to other manufacturers.

23. The retail price of descramblers has been $395. We wish to update our price information, and we seek comment on the likely future pattern of prices. M/A Com has announced that it will license the circuit board for the Videocipher II. This will enable manufacturers to produce HSD receivers that can accept a plug-in module with the descrambling circuitry in it. It is estimated that this module will add $175 to the cost of a new HSD receiver.

24. Licensing the circuit board for a plug-in module provides manufacturers with less flexibility in design that simply licensing the patents and/or any custom chips. We seek comment (from M/A Com, HBO, and other parties) on the rationale for and the effects of this procedure.

25. In order to assess this arrangement, we wish to acquire some additional information. First, has M/A Com licensed any manufacturer to produce stand-alone descramblers? Second, what is the expected life of a HSD receiver? Will the $395 stand-alone soon be irrelevant for purchasers of HSDs and for those replacing their receivers?

26. Many consumer electronics products have exhibited declining prices over time. This has been due to amortization of R&D costs, increased experience in production, and other factors. One additional factor that may be relevant in this case is the possible development of *de facto* technical standards for HSD receivers. We note that M/A Com's plan initially called for compatibility with 50 percent of HSD receivers, and HBO raised it to 90 percent. We invite comment on the effect of this increase in compatibility on the price of descramblers and on whether the technical specifications of receivers are likely to become more uniform over time. In the event that they are, we invite comment on whether this will allow for cost reductions in the descrambler

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Owner" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (March 6, 1986). Prepared statements of James F. Bunker, M/A Com, Inc. and Michael Fuchs, HBO.

module. We invite comment on what influence these factors will have on the price of descramblers. This issue clearly is related to the question of how long standalone descramblers will be demanded by the public.

27. The burden on viewers of acquiring descramblers may be alleviated if they are also available for lease. We therefore seek comment on leasing plans in effect and associated rates. We note that Telecommunications, Inc. (TCI) has announced a plan under which subscribers who take the basic program package plus two pay services can also obtain a leased descrambler. This package will cost $29.50 per month, which is only one dollar more than TCI's previously announced price for the basic plus two pay services package without the descrambler lease.[38]

28. Since January 15, 1986, when HBO became the first channel to scramble its signal fulltime, there have been complaints about the availability of descrambling equipment and allegations that consumers who wished to acquire descramblers were unable to do so or had undue difficulty doing so. We therefore seek comment on the availability of descramblers. We also seek comment on the status of Oak Industry's patent infringement suit against M/A Com[39] and the effect it may have on the availability of descramblers in particular and on the HSD satellite television market generally.

2. Incentives Facing M/A Com and HBO

29. In addition to these factual issues, we wish to explore the incentives facing M/A Com and HBO in the development of the descrambler. The situation of M/A Com seems relatively straightforward. It developed the technology under contract to HBO, investing some of its own resources in R&D. For each descrambler sold, it makes a profit, either from direct sale or from a license fee. It appears that M/A Com has a strong incentive to make descramblers widely available and to see the Videocipher II system become the industry standard. M/A Com is in the same position as any holder of rights to a proprietary technology. It has been granted a patent, based on well-settled public policy grounds of encouraging innovation. M/A Com therefore faces a

[38] *Multichannel News*, June 2, 1986 at 1. Under the new TCI plan, subscribers who do not lease descramblers pay six dollars less per month. The descrambler-inclusive package will actually begin at $23.50 and rise ot a maximum of $29.50 as the number of basic channels scrambling rises. See para. 42 *infra* and note 56 for a more complete description of this plan, including a list of 15 basic services.

[39] *Television Digest*, Jul. 14, 1986, at 9.

not-uncommon "make or license" decision. That does not diminish whatever ability it may have to earn profits on its system. Licensing additional sources of supply has the beneficial effect of providing additional capacity for periods of peak demand and, possibly, taking advantage of superior manufacturing skills of other firms.

30. The position of HBO is more complex. Its original motivation was to prevent theft of the HBO signal by cable systems and commercial establishments. By hiring M/A Com to develop the descrambling technology, HBO made an investment in it. It may (and we seek information on this point) share in the rights to the technology and hence receive a return on every unit sold. Nevertheless, it is conceivable that HBO is not truly interested in serving the HSD market. It may see prevention of commercial theft as the sole benefit of scrambling. However, if this were true, HBO would not be enthusiastic about making descramblers widely available. At least initially, HBO's behavior suggests that it is seriously interested in serving the HSD market. The imposition of requirements on M/A Com to reduce the cost of the descrambler (we seek comment on the extent to which the Videocipher II equipment costs less than the original Videocipher I equipment) and to make it compatible with a wide range of HSD receivers suggests that HBO wishes to make the descramblers available to home viewers as well as cable companies. The latter could certainly afford much more expensive equipment. We explore *infra*, the interest of HBO (and other programmers) in the HSD market.

3. Adoption of the M/A Com System by Programmers and Its Compability with HSDs

31. The information available to us now suggests that many major cable channels have, in fact, chosen the Videocipher II system. We wish to update the record on scrambling plans. Which channels have begun scrambling and what system did they choose? Which other channels plan to scramble, what system did they choose, and when do they plan to begin scrambling? Are there in fact programmers that use a system other than the Videocipher II? We gather that other systems are used or planned by some foreign programmers (over whom we have no jurisdiction in any event), some "adult" channels (which apparently do not currently transmit to cable systems anyway), and the three

broadcast networks.[40] We are also interested in whether the target of compatibility with 90 percent of HSDs has been met. We invite commenters to bring instances of incompability to our attention, and to describe the options available for HSD reception in such cases.

C. Competition for the Patronage of HSD Owners

32. We now examine in more detail the range of options open to HSD owners for the reception of video programming. The HSD is of course only one of many video distribution systems. We wish to assess the degree of competition among them. In order to determine what delivery systems provide the best alternatives to HSDs, we seek comment on the viewing patterns in HSD households. After briefly examining possible rivalry among video media,[41] we turn to the actual retailing arrangements for selling satellite television programming directly to homes.

1. Intermodel Competition

33. The three most significant video delivery systems currently available are, in our view, broadcast television, cable television, and the VCR.[42] We are interested in the availability of these media to the HSD owner. The early HSD buyers were rural Americans, with perhaps a sprinkling of suburban hobbyists. Now it appears that more and more urban and suburban dwellers are opting for HSDs.

34. The price of VCRs has fallen remarkably in recent years. It is now significantly lower than that of HSDs. Hence, VCRs must be considered affordable by anyone who can afford an HSD. We seek comment on the extent to which the VCR (and tape rental) serves as a good substitute for movie channels such as HBO. We note that the gross revenue from tape rental now virtually equals that gleaned from cable exhibition.[43]

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[40] For information on the networks' plans, see *Broadcasting*, Jan. 20, 1986 at 206 and *Satellite Week*, Jan. 14, 1985 at 4. NBC is using the Ku band for its transmissions. Even without scrambling, this is inaccessible to most HSDs, which operate in the C band.

[41] We also seek comment on the role of the audio and print media as alternative sources of news, information, and entertainment.

[42] The multichannel multipoint distribution service (MMDS) has also attracted substantial applicant interest. Few MMDS systems are in operation now, but this medium may prove to be another stalwart competitor.

[43] One source estimates 1985 gross revenue from home video rental at $3.1 billion, while "retail gross revenue" for HBO and Showtime/The Movie Channel was estimated at $3.3 billion. The theatrical market figure is $3.5 billion. See First Communications Group. *The Home Satellite Newsletter*, Nov. 13, 1985, at 3.

35. According to one estimate, one third of HSDs bought in 1985 are owned by households in "suburban areas with access to cable television."[44] We seek comment on the accuracy of this figure and the extent to which those households are actually passed by cable. In view of the limited and decreasing regulation of cable (particularly its rates), we seek comment on the proposition that cable-HSD competition is sufficient to safeguard viewers where both options are available.

36. We are aware that many HSD owners live in remote areas or those with rough terrain, in which television reception is difficult. Nevertheless, we seek comment on the number and kind (*i.e.*, network affiliates, independent stations, noncommercial stations) of broadcast signals available over the air to HSD households.

2. Marketing Satellite Television Channels to HSD Homes

37. HBO became the first satellite programmer to scramble its signal in January of 1986. Thus, there has been less than one year of experience so far with marketing satellite channels to HSD homes. After a brief review of developments to date, we turn to an analysis of the structure of distribution and the question of whether HSD households have or are likely to get access to satellite programming at competitive rates. We also consider the claim that scrambling advertiser-supported channels is unfair.

a. Developments to Date

38. We are aware of three programmers that have arranged for direct sales (via 800 numbers) of their product to HSD homes.[45] Additionally, various cable companies have begun to sell program packages to HSD homes.

39. HBO's initial offering was one pay service for $12.95 per month and two (*i.e.*, both HBO and Cinemax) for $19.95 monthly. HBO also indicated that it would license cable operators to market the service within their franchise areas on a nonexclusive basis.[46] HBO's main movie channel rival is Showtime/The Movie

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[44] First Communications Group. *The Home Satellite State of the Industry Report*, Jan., 1986, at 3, 7. Because 46 percent of all HSDs were sold in 1985, a minimum of 15 percent (*i.e.*, .33 x .46) of all HSDs are in cable areas.

[45] Under Section 705 of the Communications Act, because the programmers have scrambled their transmissions, such sales are not required. *See* 47 U.S.C. Sec. 605(b).

[46] Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d

Channel. In March, they announced prices of $10.95 per month for one service and $16.95 per month for two.[47] HBO recently countered with a 16.6 percent discount for those who sign up for a one-year subscription.[48] This discount yields monthly rates of $10.80 and $16.67 for one and two services respectively. Showtime/The Movie Channel also has a discount for those taking an annual subscription. They receive one free month, equivalent to 8.33 percent off of the prices listed above.[49] The third programmer to announce a direct sales plan is Turner Broadcasting, which will sell CNN and CNN Headline News for $25 per year to HSD homes.[50]

40. All three programmers have announced incentive programs for dealers and/or distributors of HSD equipment to sell subscriptions. For CNN, it will be $2.50 per subscription generated to HSD dealers, and a similar amount to the distributor.[51] HBO will rebate $30 to HSD dealers for every descrambler sale to customers who subsequently take a one-year subscription to one or both of the pay services.[52] Showtime's plan calls for a $10 rebate to HSD dealers for each equipment sale that leads to a subscription, with an additional rebate from distributors of up to $25.[53]

41. Various entities are endeavoring to provide HSD households with "one-stop shopping" for satellite services. HBO has an agreement to provide CNN and CNN Headline News via its toll-free ordering center, and Showtime has a tentative agreement to do the same.[54] However, it appears that the primary packagers of satellite channels to date are the cable companies.

42. TCI appears to have been the most active company thus far. It has acquired non-exclusive HSD rights to a large number of basic and premium channels. TCI announced its first package offering in late 1985, with a price tag of $28.50 per month for "basic" service plus two pay channels (separate rates were also quoted for "basic" and pay services on a stand-alone basis).[55]

Sess. (March 6, 1986). Prepared statement of Michael Fuchs, HBO, at 13-15.

[47] *Satellite Week*, Mar. 17, 1986. at 7.

[48] *Communications Daily*, June 12, 1986, at 3.

[49] *Id.* This discount results in monthly prices of $10.38 and $15.54 for one and two services respectively.

[50] *Television Digest*, June 2, 1986, at 2.

[51] *Id.*

[52] *Communications Daily*, June 12, 1986, at 3.

[53] *Television Digest*, June 2, 1986, at 2.

[54] *Communications Daily*, June 12, 1986, at 3 and *Broadcasting*, June 23, 1986, at 10.

[55] *Satellite Week*, Dec. 9, 1985, at 2.

TCI's latest offering is a $23.50 per month package. It includes 15 basic cable channels, two pay services, and rental of a descrambler.[56] As more of the basic cable channels scramble their signals, this rate will rise to a maximum of $29.50 per month. This program requires a three-year commitment by subscribers. Services can also be purchased on a stand-alone basis. TCI is negotiating for distribution rights to additional basic cable channels. United Cable offers a similar package deal for $29.95 per month, with a three-year commitment. The rate is $39 per month for an 18 month package.[57]

43. Other entities have also expressed interest in acting as packagers of programming for HSDs. One is the National Rural Electric Cooperative Association, which proposes to get into this activity on a non-profit basis.[58] Viewers First National, Inc., is a private, for-profit company formed to distribute satellite programming to HSD homes. It has apparently had little success in obtaining such rights, reporting in March that only SelecTV, which packages movies for over-the-air subscription television systems, had agreed to affiliate with them.[59] A number of small rural telephone companies have also evinced an interest in selling to HSD households within their service areas.[60]

44. As a preliminary matter, we invite commenters to bring the record up to date on program offerings. What are the current packages and prices offered by satellite programmers, by cable operators, and by other entities, if any? What negotiations are under way, if any, and what is their status? Cable programmers

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[56] *Communications Daily*, June 6, 1986, at 10. See also *Multichannel News*, June 2, 1986, at 1. That source lists the following basic cable channels to which TCI has obtained non-exclusive HSD distribution rights: CBN, CNN, CNN Headline News, Lifetime, MTV, VH-1, Nickelodeon, Arts and Entertainment, Nashville Network, Black Entertainment Television, C-SPAN, The Discovery Channel, The Learning Channel, USA Network, and the Weather Channel. The premium channels available through TCI are HBO, Cinemax, Showtime, The Movie Channel, and the Disney Channel.

[57] *Television Digest*, June 2, 1986, at 3.

[58] Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner: Part II" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (June 12, 1986). Prepared statement of Mr. Bob Bergland, National Rural Electric Cooperative Association.

[59] Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (March. 6, 1986). Prepared statement of Mr. Stephen Roberts, Consultant to Viewers First National, Inc.

[60] This information was supplied by staff of the National Telecommunications and Information Administration.

are invited to describe their policies for licensing distribution of their product. We are particularly interested in the question of sales to other distributors at the same wholesale price that cable operators pay.

45. Comment is also requested on the considerations governing the pricing of packages of channels. We are interested in comparing the price of "a la carte" offerings, where available, and channel packages, with a view to understanding any discounts associated with purchasing a package. This issue is separate from that of "one-stop shopping" *per se*. That merely involves the convenience of placing orders for several different channels with a single entity, whether or not a discount is obtained for a subscription to several channels.

46. We also seek information on cable programmers' scrambling plans. As noted *supra* there are roughly 70 satellite services and only 15 or 20 have announced scrambling plans. Do the others intend to scramble, and, if so, when do they intend to do it? Commenters are also invited to provide information on what appears to be a rapidly-growing number of networks set up for or catering to HSD owners.[61]

47. Some of the concern associated with scrambling is related to fears for the well-being of the HSD retailing industry. There was a certain degree of confusion surrounding the early moves to signal scrambling, and HSD sales plummeted.[62] We request comment on the current state of the HSD market. Has it rebounded? What are its future prospects?

48. We now turn to the question of whether HSD households have access to satellite programming at competitive prices. First, we examine the structure of the distribution market and then we consider analogies between HSDs and cable subscribers or cable operators, comparing the prices charged to the various groups. We seek comment on those and any other relevant methodologies.

b. The Structure of the HSD Distribution Market

49. Although the business of selling to HSDs is admittedly still in its youth, if not its infancy, two basic distribution paths seem to have emerged. First, various programmers have arranged to sell directly to HSDs. They have set retail prices and also instituted procedures whereby HSD dealers can get commissions for marketing the services to their customers at the programmer-

[61] See *OnSat*, July 13–July 19, 1986, at 3, 45. See also *STV*, July, 1986, at 36, 38.
[62] See *Communications Daily*, May 28, 1986, at 5.

set retail price. Second, cable operators, who effectively buy the services at a wholesale price and mark it up for resale to their subscribers, have obtained non-exclusive rights to retail them to HSD households. In the case of HBO, cable operators are prohibited from marketing outside of their franchise areas.[63]

50. Regardless of the distributor, the customer is responsible for obtaining his own HSD.[64] HSD dealers generally provide installation service. The customer must also acquire a descrambler. These may be purchased from local retailers; some distributors will also ship them directly upon receipt of a telephone order. At least one cable operator will lease descramblers. Program distributors also arrange for the descrambler to be activated from a central computer, operated by M/A Com. A customer buying HBO, Cinemax, and CNN direct from HBO would place his order via an 800 number with HBO. HBO would in turn notify the computer to authorize the customer for all of those services and would also handle billing for all the services. Thus, the descramblers are individually addressible and can accommodate a large number of channels. Cable companies would follow a similar procedure for the channels that they are licensed to retail. We seek comment on the accuracy of this depiction of the distribution system.

51. In order to make our market structure analysis concrete, let us consider two programmers—HBO and Showtime—and two regions—one a cable franchise area and one not. Inside the cable franchise area, HBO and Showtime compete with each other, and with other media such as VCRs. The two programmers set the wholesale price of their programming to the cable system. The cable operator, in turn, sets the retail price. Thus, HBO and Showtime can compete by adjusting the wholesale price, which is an input to the retail price. VCR competition and other video alternatives put pressure on the cable operator to keep retail rates down.

52. Cable operators are also free to retail to HSDs, but, unlike the cable case, HBO and Showtime also retail directly to HSDs, each setting its own direct retail price. If HBO or Showtime had any market power (and we are *not* arguing here that they do), it

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[63] See Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner: Part II" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (June 12, 1986). Prepared statement of Michael Fuchs, HBO, at 13-15.

[64] Some cable operators have expressed an interest in entering the HSD equipment business.

could be exercised via setting the wholesale price to cable operators and its own retail price. Adding additional wholesalers would not affect the situation.

53. Another possibility is that the cable systems have some market power. Presumably this would be exercised by keeping retail prices above the competitive level (and, concomitantly, above the level desired by HBO and Showtime). If this were the case, it appears that the programmers would welcome the availability of an alternative distribution channel, in order to be able to reduce retail rates.[65] Yet it has been alleged that cable operators have pressured programmers not to be too "friendly" to HSDs. Such pressure could involve exhortations to scramble even though the programmer did not want to do so, or it could involve demands to keep rates high. The most common scenario has these exhortations backed by cable operator threats to stop cable carriage of certain channels.

54. We seek comment on the extent to which such threats have actually been made and the extent to which they are credible. Have any programmers been subject to pressure to scramble? Do programmers, particularly those with popular channels, not have some leverage of their own? If cable operators have some bargaining power *vis a vis* programmers, are they not exploiting it fully already (perhaps to keep wholesale prices down)? Is it possible that cable operators are sufficiently entrenched as a powerful distribution medium that they could inflict severe damage on programmers (by refusing to carry their channels) before the HSD and/or some medium could become a viable alternative?

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[65] If cable systems had any market power, it could be exercised upon the termination of basic cable rate regulation on January 1, 1987 for areas that receive three or more unduplicated broadcast signals. (The Cable Communications Policy Act of 1984 prohibited rate regulation after that date where cable television is subject to "effective competition." The Commission was required by that Act to develop a definition of "effective competition." See *Report and Order* in MM Docket No. 84-1296, 50 Fed. Reg. 18637 (May 2, 1985).) Suppose, *arguendo*, that basic rates are currently too low to cover the cost of connecting cable subscribers to the headend, and that consequently some of those costs are covered by the operators' share of subscription revenues from HBO, etc. If basic rates then increase, allowing recovery of more (or all) connection costs from those rates, then, in principle, premium rates could fall by the amount of their previous contribution to the connection costs. This might well be in the programmers' interest but not in the operators'. Thus, if cable operators had market power, they might exercise it by keeping retail rates for premium channels higher than programmers might wish. An increase in basic rates is, of course, not in itself an indicator of market power. Only if such rates were to rise above the competitive level would the presence of market power be suggested.

55. It appears that if the cable operator were to set excessive prices or provide poor service to HSDs, programmers could appoint other distributors or simply lower their own retail prices. Programmers benefit from signing up as many subscribers as possible. Furthermore, only 56 percent of homes passed by cable are even basic cable subscribers,[66] and not all homes in franchise areas will ever be passed. For many homes, the HSD may be the only way to sell Showtime or HBO.

56. These considerations suggest that great caution should be exercised in considering the imposition of a particular distribution system on those satellite television programmers that have chosen to distribute their product to HSD homes. Economists and legal scholars have long recognized that limiting the number of distributors of a product can have important efficiency benefits, in terms of providing distributors with appropriate incentives for marketing, promotion, and service.[67] In recent years, the courts have taken cognizance of this, and vertical restrictions on distributions are now judged by a "rule of reason" standard under the antitrust laws, rather than being "per se" illegal.[68]

57. We note that analyses which conclude that vertical distribution restrictions are beneficial frequently refer to the existence of *interbrand* competition (*e.g.*, that between HBO and Showtime).[69] We seek comment on this in light of the fact that, while HBO and Showtime both sell directly to HSDs, the cable company appears frequently to be the exclusive *local* distributor of not just one, but various rival channels.

58. Having discussed the incentives of cable programmers, we turn to those of the cable operators. They too have proclaimed their interest in marketing to HSDs.[70] We seek comment from them and others regarding their commitment to the HSD market. How attractive are HSD customers to them? If we assume, *arguendo*, that the net revenue to the operator from a cable subscriber and a HSD subscriber are comparable, does the

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[66] *Cablevision*, June 23, 1986, at 88.

[67] See Blair, Roger D. and Kaserman, David L., *Law and Economics of Vertical Integration and Control* (New York: Academic Press, 1983) and Bork, Robert H., *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), chapter 14. See also Williamson, Oliver E., *The Economic Institutions of Capitalism* (New York: Macmillan, Inc., 1985), esp. chapters 4 and 5.

[68] See *Continental T.V., v. GTE Sylvania Inc.* 433 U.S. 36 (1977).

[69] Bork, Robert H., *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), chapter 14.

[70] See the discussion of TCI and United Cable *supra* at para. 42. See also *Communications Daily*, Mar. 18, 1986, at 5-6.

operator care what kind of a subscriber it is? We note that the costs of cable plan appear to be more or less fixed by franchise agreement; that is, the cable operator will incur most of them regardless of the number of subscribers. If this is true, then the cable operator should not be biased against HSD subscribers.[71] Indeed, to the extent that HSD service allows cable operators to be exempted from wiring certain less-dense parts of their franchise area, they might actually welcome the HSD technology as a cost-effective way of serving some customers. We seek comment on this scenario, including on the question of the revenue derived from cable versus HSD subscribers.

59. We also note that many cable programmers have significant cable system holdings. We seek comment on what if any influence this has on their attitudes and practices toward HSDs. Are there differences between them and those cable programmers, *e.g.*, the Disney Channel, who have no significant cable system holdings?

60. While a significant number of HSDs are located within cable franchise areas,[72] it appears that most of them are outside such areas. While HBO and Showtime both sell directly to these households, we are not aware of any other distribution channels for them. We seek comment on programmers' distribution plans for these areas. Since there is no alternative means of getting programming to these households, it seems safe to assume that the programmers have proper incentives to market to HSDs. Nevertheless, at least one programmer, HBO, prohibits its cable system distributors from selling outside of their service areas. While the efficiency considerations discussed *supra* at para. 56 may explain this for areas served by another cable operator, such an explanation is irrelevant to areas in which there is no local dealer whose complementary efforts need reward. We seek comment on the rationale for this restriction, and on whether other programmers also impose it.[73]

c. Analogies Between HSDs and Cable Subscribers or Cable Operators

61. HSD subscribers can be analogized to cable subscribers or to cable systems. The former analogy is based on the fact that

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[71] Nevertheless, it appears that many in the HSD industry have a particular objection to the cable operator acting as the sole local distributor in its service area.

[72] See note 44, *supra*.

[73] See *Communications Daily*, Jul. 17, 1986, at 1-2 for a description of Showtime's limitations on out-of-franchise area sales by cable operators.

both are individual households purchasing service. Essentially it is a retail transaction. In this framework, HSD prices would be compared to those for cable subscribers. The fee paid by a cable subscriber who receives both premium and basic service covers a share of the following expenses: premium and basic cable channel program acquisition costs; system overhead, including billing, promotion, and maintenance; capital costs of the system's headend and the actual cable and other plant that connects it to the subscribers' premises.

62. The question of how cable's capital costs are recovered is hotly debated. If recovery is solely from basic cable rates, then HSD and cable subscribers would pay the same premium channel rates under this scenario. HSD purchasers of basic plus premium service would pay lower rates than cable subscribers.[74] We seek comments on this analysis, and are particularly interested in information on the respective costs of serving cable and HSD customers.

63. Continuing the HSD-cable subscriber analogy, we now compare the rates charged to HSDs by cable operators and by programmers selling directly. There appear to be some economies of scale in billing and record-keeping that make it efficient for programmers to deal with cable operators. These economies would provide a rationale for the programmer's price to HSDs being higher than that of the cable operator. On the other hand, the programmer does not have the same local promotional expenses to amortize. We seek comment on these matters.

64. The other analogy offered is between cable *operators* and HSDs. This analogy stresses the fact that HSDs provide their own program distribution facilities. This is true, but HSDs do not offer the billing and record-keeping economies cited *supra*, so they are more expensive to serve than cable systems with perhaps thousands of subscribers. Furthermore, the wholesale price to cable operators is set with an eye to leaving them a margin to finance local promotional activities. HSDs do not provide such activities and hence it may not be appropriate to "compensate" them via a reduction in the price of programming.

65. We note that HBO's marketing plan includes a monthly rebate to the local cable operator for each subscription sold in its area by HBO.[75] We seek comment on this practice in light of the

[74] This is on the assumption that the HSD household purchases its own descrambler.

[75] The rebate varies with the payment that the cable operator makes to HBO for each cable subscriber.

foregoing discussion. Can such a rebate be reasonably explained as compensation for marketing services by the cable operator? Comments are also invited on the cable operator-HSD analogy itself.

d. The Scrambling of Advertiser-Supported Satellite Cable Channels

66. Another pricing issue involves a claimed distinction between pure subscription and advertiser-supported satellite television programming. Some claim that it is unfair to scramble and charge for advertiser-supported programming, because consumers are already paying for it by purchasing the advertised products. Section 705(b) and Section 705(c) of the Communications Act apply both to advertiser-supported and to pure subscription programming. Because program quality is directly related to the revenues that programmers can earn, viewers may well benefit from a system in which subscription fees as well as advertising revenues are available to finance program production. This possibility is particularly important given the current limited demand for advertising on cable channels. Many cable channels now depend heavily on subscription fees, paid by cable operators, generally on a per-subscriber basis. In 1985, subscriber fees accounted for 30 percent of the revenues of ESPN. The comparable figures for CNN, Arts and Entertainment, and Nickelodeon were 48, 68, and 75 percent respectively.[76] Another popular service, CBN, recently announced the imposition of subscriber fees.[77] We seek comment on whether advertiser-supported cable channels are in a different class than pure subscription channels for purposes of analyzing the effects of scrambling.

e. Other Issues

67. In this section, we seek comment on the M/A Com clearinghouse, the possible migration of cable satellite programming from the C band to the Ku band, and the impact on HSD owners of the move to two degree spacing of satellites.

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[76] Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (March 6, 1986). Prepared statement of James P. Mooney, National Cable Television Association, at 2.

[77] *Broadcasting*, June 16, 1986, at 67.

68. M/A Com, the firm that developed the Videocipher II scrambling system, operates an "authorization computer center" for use with that system, on a non-profit basis.[78] Any programmer using the Videocipher II system may make use of the computer center. Programmers transmit subscriber authorization information to the center, which produces a data stream for each individual descrambler, indicating all the channels it is authorized to receive. That stream is returned to each programmer. Each program that a descrambler is authorized to receive contains authorization for all programs that are authorized for reception. Tuning into one scrambled channel activates the authorization for all of them.

69. We seek comment on the operation of this system. We invite programmers to evaluate its efficiency and to bring to our attention any problems that may have arisen with respect to it.

70. We also seek comment on the implications for the HSD of the possible migration of satellite television programming to the Ku band.[79] First, we are interested in finding out what if any plans programmers have to make such a move. Second, we are interested in the reasons for such a move. Third, we would like to find out if programmers intend to continue marketing to HSDs after a move to the Ku band. Fourth, we seek comment on the relative costs of C band and Ku band receiving equipment, as well as on the technical practicability and cost of modifying existing C band dishes to receive Ku band signals.[80]

71. As the demand for satellite transmission capacity grew, the Commission found it necessary in 1983 to reduce the orbital spacing of domestic satellites to two degrees.[81] Uniform two degree spacings were implemented immediately in the 12/14 GHz bands, but orbital assignments on the basis of uniform two degree spacings in the 4/6 GHz bands were not made until 1985.[82] This

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[78] Hearing on "Ensuring Access to Programming for the Backyard Satellite Dish Owner" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (March 6, 1986). Prepared statement of James F. Bunker, M/A Com, Inc., at 9-10.

[79] See *Broadcasting*, July 7, 1986, at 39-40.

[80] Canadian manufacturers are developing combination C/Ku band receivers. Complete systems are available for as little as $1,299. See *Canadian Communications Reports*, June 30, 1986, at 2-3.

[81] *See* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d 577 (P&F)(1983).

[82] *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 94 FCC 2d 129 (1983) for the 12/14 GHz implementation. For the 4/6 GHz assignments, *see* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 35228

transition period allowed newer receiving terminals to be developed to provide better signal quality for viewers who did not wish to accept the higher interference levels to existing equipment that would result from two degree spacings. We seek information on the extent to which existing equipment might become unusable, and the cost of retrofitting such equipment to receive clearer signals, once domestic satellites are actually spaced two degrees apart in the 4/6 GHz bands.

f. Summary

72. In this section we have explored the competition, actual and potential, for the patronage of HSD owners. We have asked for comment on the extent to which other video delivery media are available to HSD homes. We have examined the structure of distribution, noting that there are currently two independent HSD distribution channels. We have inquired into the incentives of those two distributors—the cable companies and the major programmers. We have considered the factors that determine the prices of cable and HSD service and attempted a rough comparison of those prices. Finally, we have raised issues relating to the M/A Com authorization center and the potential switch from C band to Ku band transmissions. We seek comment on all issues raised herein. We wish to update the record on service offerings and prices, as well as to receive critical analysis of our tentative conclusions regarding rivalry for HSD patronage and the incentives of programmers and cable operators to serve the HSD market.

73. The comments submitted regarding competition for the HSD owners' patronage should address themselves as well to the question of what if anything the Commission should do to promote the public interest in this area. Should additional distribution channels be mandated, and if so, how should we go about it? Is price regulation of some type needed, and if so, what is an appropriate regulatory regime? Is regulatory action premature, and does prudence therefore dictate a period of monitoring rather than immediate action? Alternatively, is the HSD market in grave danger of dying from benign neglect? We repeat that we wish to develop an extensive and complete record as the basis for our deliberations.

(Aug. 30, 1985). In the portion of the orbital arc where the major cable satellites are, the Commission has delayed ordering satellites to be located two degrees apart until actually necessary to accommodate authorized satellites. *Id.*, at 35231.

D. The Benefits of Scrambling

74. We noted above, in our discussion of scrambling advertiser-supported cable channels, that the viewer may benefit when the stream of revenue available to fund new programming is increased. A similar consideration applies to pure subscription programming, such as the premium movie channels. Programmers such as HBO maximize their revenues when they are able to collect subscription fees from all who view their programming. This in turn gives them more money to use in the acquisition of new programming, and encourages others to enter the market.

75. The producers of programming are, of course, sensitive to the return that they can earn on their creative efforts. As the base of paying viewers goes up, so does the reward to creative effort. Thus, scrambling not only increases the incentives for creative effort, but also simultaneously is fair to the copyright owners by allowing them appropriate control over their intellectual property. In this connection, we seek comment on the international implications of scrambling. The copyright laws of some other countries, Canada in particular, afford American program producers little if any protection. Scrambling can help protect producers' rights in this context, particularly in the case of the superstations. It is being assumed in some countries that the superstations and other broadcast stations are available for commercial use without compensation or consent.[83]

76. A third potential benefit of scrambling is that it may encourage the further development of direct-to-home satellite television transmission. While scrambling is not important for broadcast-type programming, the current trend appears to be toward programming supported by both subscription fees and advertising. To offer that on a satellite-to-home basis requires scrambling. The move to the Ku band, mentioned above, is motivated in part by the lower cost of receiving equipment. Thus, it may be that these two developments taken together could lead to a new and lower-cost program distribution system. Such a system was envisioned in our Direct Broadcast Satellite (DBS) proceeding.[84]

77. We seek comment on these and any other potential benefits associated with the scrambling of satellite television signals. Comment is also invited on whether mandating terms of access

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[83] The legal issues relating to superstation scrambling are discussed *infra*.

[84] See *Report and Order* in Gen. Docket No. 80-603. 90 FCC 2d 676 (1982). In spite of the use of the term "broadcast" in the service's title, non-broadcast uses of DBS are also contemplated.

and rates for serving HSDs could actually discourage DBS by excessively reducing its potential profitability.

IV. The Broadcast Networks

78. Until a few years ago, the three commercial broadcast networks transmitted their progamming via land lines (leased from AT&T) to their broadcast station affiliates for transmission to television households over the air. NBC was the first network to complete the transition from land lines to satellite distribution for the so-called "network feed," doing so in January of 1985.[85] NBC, which contracted with Comsat for this service, uses the Ku band for its transmissions. CBS began the process of conversion in 1984, with the plan to complete it by January of 1987. All three networks have at least investigated scrambling their feeds.[86] CBS has begun partial scrambling using M/A Com's Videocipher I system, which is incompatible with the Videocipher II. NBC is developing a proprietary scrambling system, and ABC is evaluating several systems. The NBC feed, because it is in the Ku band, is not available even unscrambled to most HSD households.

79. The network feeds differ from the cable channels discussed above in at least three important ways, and hence present a different set of issues. First, the Section 705(b) exemption to the prohibition of unauthorized reception of radio communications applies only to "satellite cable programming." As defined in Section 705(c)(1), that does not include network feeds, because they are not primarily intended for direct reception by cable operators. Second, while all of the networks are at least planning to scramble their feeds, none has indicated a willingness to sell access to the network feed. Third, the network feed differs significantly from the program that is received via television stations by viewers. The network feed does not include local programming, commercials, and public service announcements. It does include some additional material not intended for transmission to the public.

80. We shall explore the implications of these differences below. As a preliminary matter, we request information on the scrambling plans of the three major commercial television networks, and on those of PBS (if any).

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[85] *Satellite Week*, Jan. 14, 1985 at 4.

[86] *Broadcasting*, Jan. 20, 1986, at 206. See also *Satellite Week*, July 21, 1984, at 6. A CBS official informed Commission staff that its conversion will be completed in the fourth quarter of 1986.

A. What is the Network Feed?

81. Local television station affiliates of the broadcast networks add local programming, local commercials, and local public service announcements to the network programming and advertising in order to complete the program package that they broadcast to the public. In order to understand the networks' choice to distribute programming solely via affiliates, we seek comment on the quantity of each type of material that is inserted at the local level.

82. Less information is currently available regarding the portion of the network feed that is not meant for relay to the public. In testimony before the House subcommittee, CBS described this material as follows:

> programs may be fed to affiliates in complete or nearly complete form for prescreening prior to broadcast . . . Also fed to affiliates are closed-circuit conferences and promotional briefings which are not intended for local broadcast, as well as additional news pieces which are not intended for broadcast in the form in which they are fed.[87]

The testimony also notes that programming is often intended for broadcast at different times by affiliates in different geographic areas, and that, particularly in the case of football games, different material is intended for broadcast in different areas.

83. At an earlier subcommittee hearing, a representative of the National Association of Broadcasters characterized the network feeds as private transmissions, which frequently include intranetwork communications and sensitive programming for affiliates to pre-screen prior to broadcast.[88] We seek comment on precisely what type of material is in the network feed and on the networks' reasons for desiring to keep it confidential. At the same time, we seek comment on the basis for claims that the network feed should be available to HSD owners, in light of the following two considerations. First, such access was neither sought nor available when the network feed was distributed by land lines. Second, the Section 705(b) exception to the prohibition of unauthorized reception does not apply to transmissions not intended primarily for direct reception by cable operators.

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[87] Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner: Part II" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (June 12, 1986). Prepared statement of Donald D. Wear, Jr., CBS Broadcast Group, at 6-7.

[88] *Broadcasting*, Mar. 10, 1986, at 36.

B. The Network-Affiliate Distribution System

84. There are certain similarities and differences between the distribution systems for cable programming and network television programming. A cable network, such as HBO, provides its programming at a wholesale price to local distributors, *i.e.*, cable systems, which then retail it to home viewers. A broadcast network, in essence, sells its programming to local affiliates, who "retail" it to home viewers also. Of course, in the broadcast case home viewers pay no fee for programming.

85. Broadcast networks have chosen what amounts to an exclusive distribution system. Each network affiliates with only one station per market.[89] This is a long-standing, long-accepted arrangement that has some important efficiency properties. Briefly, it promotes investment by the affiliates in local programming. Exclusivity enhances the value of network programming. By adjusting the flow of monetary compensation to affiliates and the number of advertising minutes held out for network use, it is possible to provide the affiliate with the marginal incentives and wherewithal to provide popular programming. Such programming not only enhances the network's reputation, but it also can enhance the audience for network programming as well. Highly-rated local programming can deliver a large "lead-in" audience to the network's programming.

86. We noted above that, while most HSD households are in rural areas, some thirty percent of them are in cabled areas. We seek information on the availability of over-the-air network broadcast service to television households in general and HSD households in particular. What fraction of television households get over-the-air service via affiliated stations or translators from each broadcast network? Of those households that do not have over-the-air service, what fraction have access via cable? Of those with neither type of access, what fraction have HSDs?

87. It appears that different considerations obtain depending on whether HSD households are located inside or outside of the service area of a network affiliate. If a HSD household within the service area of a network affiliate chooses to view the network feed rather than the local affiliate's transmission, the local affiliate loses advertising revenue. To the extent that such viewing reduces the profitability of the affiliate, the networks

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[89] Because a television broadcast signal covers a wide area, some viewers, particularly those who live between two markets, may receive the signals of more than one affiliate of the same network. Cable systems also may retransmit more than one affiliate of the same network.

appear to have a significant concern. Such viewing erodes the exclusivity that the networks confer on affiliates in order to provide them with the programming incentives mentioned above.

88. In contrast to this is the case of HSDs outside of affiliate service areas. These households have no over-the-air alternative for network service. We seek comment on alternative methods of providing service to these households. CBS has announced the formation of a task force to study the feasibility of serving these areas with translators.[90] We seek comment on this option. We invite the other broadcast networks to inform us of any plans or studies in which they are engaged on this subject. We are primarily interested in information on the technical feasibility and economic viability of increased translator use. We do not seek another discussion of the issues regarding the process by which translators and low power television stations are licensed.[91]

89. The possibility has been raised of scrambling the network feed on a geographical basis.[92] The M/A Com system is capable of restricting access to scrambled programming based on the zip code area of potential subscribers. In principle, then, it would be possible to develop a list of zip code areas in which network service is not available, and access to a network feed could be restricted to those areas. We seek comment on the ease with which this system could be defeated by viewers in prohibited areas using mailing addresses in non-prohibited areas (*e.g.*, homes of friends and relatives, post office boxes).[93]

90. This alone would not meet the expressed concerns of the networks, however. Some households would still be viewing transmissions not intended for the general public. If the networks were to prepare and transmit a "clean" feed (one stripped of all private communications) for use by HSD households without over-the-air network service, then that concern would be met too.

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[90] Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner: Part II" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (June 12, 1986). Prepared statement of Donald D. Wear, Jr., CBS Broadcast Group, at 15–16.

[91] We recently reviewed these issues in the context of a *Notice of Proposed Rulemaking* in MM Docket No. 86-286, adopted June 26, 1986. Therein we proposed a new application procedure, without changing our basic conclusion that LPTV and translator applications be processed together.

[92] Letter to the Honorable Thomas J. Tauke, U.S. House of Representatives from Jeffrey Krauss, Vice President Corporate Affairs, M/A Com Development Corporation (May 7, 1986).

[93] This issue is also relevant to the discussion at para. 75 *supra*, on restricting foreign access to programming.

Of course, the networks could incur significant costs in preparing and transmitting such a feed.

91. We seek comment on this option and on the costs involved, without endorsing it or making any finding regarding its practicality or legality. Preparing and transmitting a separate feed would obviously be an added expense for the networks. We have grave doubts about the propriety and necessity of requiring a particular distribution system for network television. Because network profits depend so heavily on the size of the audience reached, it appears that they have strong incentives to expand their reach to the maximum extent feasible. We recognize that television service is of great importance to the American public, but we note that the networks now reach far more households than have telephones.[94] We seek comment on network incentives to serve a broad audience and on whether, in light of it, any Commission action is appropriate.

V. Legal Issues

92. This *Inquiry* raises a host of legal issues, principally jurisdictional, upon which we seek comment from interested parties. One basic jurisdictional issue raised herein in our authority, should we be inclined to do so, to require a uniform scrambling standard. There obviously is no specific authority in the *Act* empowering us to take such action, but our general rule making authority under Sections 4(i) and 303(r) of the Act may be broad enough to encompass such an action. For example, our promulgation of technical standards for color television was done pursuant to such general authority. On the other hand, our requirement for all-channel television receivers was issued pursuant to specific authority from the Congress in the form of an amendment to the Communications Act (47 U.S.C. 303(s)). Accordingly, we seek comment upon this general matter.

93. A second jurisdictional question is that of our rate regulation authority as applied to satelllite programming—*i.e.*, whether we possess sufficient authority to regulate the rates to be charged for satellite services to assure "reasonable charges." Satellite programmers do not fit clearly within the regulatory authority of

[94] The penetration rates are roughly 98 percent and 92 percent respectively. See Hearings on "Ensuring Access to Programming for the Backyard Satellite Dish Owner: Part II" Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess. (June 12, 1986). Prepared statement of Donald D. Wear, Jr., CBS Broadcast Group, at 9.

the Communications Act. They are not common carriers (over which our rate regulation authority is clear), but customers of common carriers. For the most part, they merely lease satellite capacity from common carriers and have no obligation under the Communications Act to serve others indiscriminately. On the other hand, should they be considered broadcasters, rate controls are not part of the regulatory structure which the Communications Act applies to broadcast licensees (*FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940)). In different circumstances, the court has suggested that certain programmers that are customers of common carriers could be licensed as broadcasters. *NAB v. FCC*, 740 F. 2d 1190 (D.C. Cir. 1984). We are exploring this and related issues in our outstanding *Notice of Proposed Rulemaking* in Gen. Docket 85-305, 51 Fed. Reg. 1817 (Jan. 15, 1986). One of those related issues is the relevance of ancillary jurisdiction, of the type we exercised over cable television prior to the 1984 amendments to the Act and which authority was subsequently affirmed by the United States Supreme Court—*see U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

94. Assuming *arguendo* the jurisdictional nexus over satellite programmers, the establishment of appropriate rates presents a difficult problem. How is "reasonableness' to be determined? Would all rates nationwide be regulated and uniform or, similar to the approach utilized in the Cable Communications Policy Act of 1984, would it be necessary to act only where effective competition did not exist?[95] Further, what would an appropriate standard be for determining "effective competition" in the market of satellite programming? How could pay-per-view programming ever be regulated effectively? Moreover, what constitutional obstacles would exist to any effort to regulate the rates charged by programmers as contrasted with facility providers? With respect to the general subject of rate regulation of pay programming, we note that in the early days of cable pay programming we exercised federal preemption in order to let the market operate freely (*Brookhaven Cable TV, Inc. v. Kelley*, 573 F. 2d 765 (2nd Cir. 1978); does that action provide any guidance which would be of relevance here? We seek comment on such matters and any

[95] Section 623 of the 1984 Act, codified at 47 U.S.C. Sec. 543, permits the regulation of basic cable rates only when the cable system is not subject to effective competition. The regulatory authority does not extend to "non-basic services." *See Report and Order* in MM Docket No. 84-1296. 50 Fed. Reg. 18637, 18649 (May 2, 1985).

other issues related to rate regulation in the context of this proceeding.

95. Yet another jurisdictional question is whether we have authority to mandate a national retail distribution structure for the sale of satellite programming by parties other than cable operators or satellite programmers. Our authority in this area appears even more tenuous than in the two areas just discussed. In a somewhat analogous situation we were urged to exercise jurisdiction over the rates and conditions for pole attachments by cable companies to poles owned by utility companies. However, after due deliberation we concluded that we lacked such authority and did not exercise authority until given specific approval to do so by new Section 224 of the Communications Act (47 U.S.C. 224). As with satellite programmers, regulating retailing entities not traditionally within our jurisdiction requires a cautious approach. In this instance, what would be our jurisdictional nexus? What form would such regulation take?

96. A particularly complex legal issue is raised with respect to the viewing by HSD owners of network television feeds as they are being distributed to their affiliates via satellite. As discussed earlier (paras. 16, 79 *supra*), the issue is governed by Sec. 705 which was amended in 1984 to specifically cover HSD viewing. In brief, Sec. 705(b) creates an exception to the prohibitions against unauthorized interception and disclosure of radio communications for private viewing of satellite transmissions intended for cable systems whenever the programming is not encrypted and no marketing system has been established to permit private viewers to receive the programming. It is our view, however, that this exception does not apply to satellite network television feeds. On November 27, 1985, the Commission's Office of General Counsel issued its opinion on this issue, which we are attaching hereto as Appendix A (Letter to Honorable Robert W. Kastenmeier). In brief, after noting that no court cases interpreting Sec. 705 are directly on point, the General Counsel stated that the case law applying Section 705 to MDS transmissions "strongly suggests that Sec. 705(a) prohibits the unauthorized interception of satellite network feeds." The opinion noted that such network feeds are not intended to be viewed by the general public in the form they are transmitted from satellites, and thus do not come within the scope of the exception in Sec. 705(a). The opinion concluded:

> Finally, we recognize that under certain conditions, Section 705(b) further excepts from the prohibition of 705(a) the interception of satellite cable programming for private viewing. The satellite network feeds are not,

however, satellite cable programming as that term is defined in Section 705(c)(1). Thus, Section 705(b) does not otherwise sanction the interception.

In summation, Section 705(a) appears to encompass the network satellite feeds. Unauthorized interception of those signals by home owners with satellite antennas or the unauthorized sale of decoders could lead to civil or criminal actions under Section 705. *See, e.g., Movie Systems, Inc. v. Heller, supra, United States v. Westbrook*, 502 F. Supp. 588 (E.D. Mich. 1980).

We are aware that not all parties concur in the above conclusion and request comments directed thereto. Assuming this opinion is correct, we also seek comments on what can be done on our part to encourage the delivery of valuable network programming to satellite viewers.

97. Lastly, in the interest of a more complete record herein, we raise for comment another legal issue over which we have no jurisdiction but which impacts strongly upon HSD viewers—*i.e.*, the impact of the copyright laws upon superstations. Simply stated, the problem is that under the Copyright Act when superstations are carried by cable systems, such systems are obligated to pay copyright royalties in the form of a compulsory license; however, superstation common carriers apparently now plan to scramble their signals in order to protect their services from unauthorized users, and HSD viewers are not, in the view of at least some superstations, authorized users under the 1976 Copyright Act. What is needed, it is asserted, is a modification of the Copyright Act to extend the compulsory license to HSD owners, in exchange for reasonable compensation. We will welcome any comments as to what, if anything, we can do in this area.

VI. Conclusion

98. We have attempted to enumerate all of the issues relevant to the scrambling of satellite television programming. In order to assemble a comprehensive record, we invite comment on them from all interested parties. If any issues have been left out, we urge commenters to rectify the omission. The record established in this proceeding will allow us to analyze thoroughly the impact of scrambling on the availability of satellite television programming to HSD households, and to determine if any Commission action is needed to meet our public interest goals.

99. Authority for issuance of this Notice is contained in Sections 4(l), 303(r) and 403 of the Communications Act of 1934, as amended (47 U.S.C. Sections 154(i), 303(r) and 403). Pursuant

to applicable procedures set forth in SEctions 1.415, 1.419, and 1.430 of the Commission's Rules, interested parties may file comments on or before October 10, 1986 and reply comments on or before October 27, 1986.

100. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

101. For information concerning this proceeding contact Jonathan D. Levy, Federal Communications Commission, Washington D.C. 20554 (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
November 27, 1985

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties, and the Administration of Justice
2137 Rayburn Building
Washington, D.C. 20515

Dear Congressman Kastenmeier:

At a recent meeting between congressional and Commission staff, David Beier requested that my office issue an opinion on the applicability of Section 705 of the Communications Act to network television feeds. Specifically, we were asked whether Section 705 prohibits owners of satellite antennas from intercepting the networks' television feeds as they are being distributed to their affiliates via satellite. In general, those transmissions contain network programming and the national commercial spots. Local advertising and programming are added at the affiliates' broadcast station. Thus, by intercepting the networks' satellite feeds, viewers are seeing essentially the same programs as other television viewers but without certain commercials.

Section 705 provides, in pertinent part that

> . . . No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto . . . This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public . . .

The courts, in several civil and criminal actions, ahve been the primary interpreters of Section 705. Unfortunately, none of the decided cases are directly on point in that they do not apply to the interception of satellite network feeds. However, the case law applying Section 705 to MDS transmissions strongly suggests that Section 705(a) prohibits the unauthorized interception of satellite network feeds.

The networks' satellite feeds clearly constitute interstate radio communications. Viewing those transmissions constitutes a use by the owner of the satellite antenna of the signal "for his own benefit". *See e.g., Movie Systems, Inc. v. Heller*, 711 F.2d 492 (8th Cir. 1983); *Hoosier Home Theater, Inc. v. Adkins*, 595 F. Supp. 389 (S.D. Ind. 1984). The networks and their local affiliates fund their operations from advertising revenues, which, in turn, are a function of the size of the viewing audience. Because some local commercials are not carried on the network feeds, owners of satellite antennas would not see those commercials and hence would not generally be counted as part of the viewing audience. Therefore, unauthorized interception of the satellite network feeds has the effect of reducing the networks' audience and, as a consequence, their affiliates' operating revenues. In economic terms, this appears to be analogous to the unauthorized interception of subscription television signals without payment.

Section 705(a) expressly excludes from its prohibition radio communications transmitted for the use of the general public. Satellite transmissions, like MDS transmissions, are, however, a common carrier service provided on common carrier frequencies. *See Movie Systems, Inv. v. Heller, supra* at 495; *Home Box Office, Inc. v. Advanced Consumer Technology, Movie Antenna, Inc.*, 549 F. Supp. 14, 24 (S.D.N.Y. 1981); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 465 (6th Cir. 1980). For the reason discussed above concerning advertising revenues, they are not intended to be viewed by the general public in the form they are transmitted from satellites. Additionally, in determining the applicability of this exclusion, the critical factor is the intent of the party transmitting the radio communications. *See Chartwell Communications Group v. Westbrook, supra* at 464-465. The networks are of course the ultimate authority on their intent. It appears that network satellite feeds are only intended for reception by their affiliates. We believe that the networks are considering scrambling these transmissions in order to preclude their interception. Existing case precedent does not require, however, that networks scramble their signals in order to be encompassed within Section 705. *See Home Box Office, Inc. v. Advanced Consumer Technology, Movie Antenna, Inc., supra* at 21-22; *Hoosier Home Theater, Inc. v. Adkins, supra* at 396.

Finally, we recognize that under certain conditions, Section 705(b) further excepts from the prohibition of 705(a) the interception of satellite cable programming for private viewing. The satellite network feeds are not, however, satellite cable

programming as that term is defined in Section 705(c)(1). Thus, Section 705(b) does not otherwise sanction the interception.

In summation, Section 705(a) appears to encompass the network satellite feeds. Unauthorized interception of those signals by home owners with satellite antennas or the unauthorized sale of decoders could lead to civil or criminal actions under Section 705. *See e.g., Movie Systems, Inc. v. Heller, supra*; *United States v. Westbrook*, 502 F. Supp. 588 (E.D. Mich. 1980).

Sincerely yours,

Jack D. Smith, *General Counsel*

Candor
Diversification
Integration of Management and Ownership
Misrepresentation

In hearing proceeding involving four mutually exclusive applicants for new TV station, Review Board affirms the ALJ's grant to applicant on standard comparative issue. The Board denied exceptions alleging misrepresentation and lack of candor against winner based on deference to ALJ's credibility findings, its own examination of record, and the lack of a separate misrepresentation issue. The Board also found that the integration proposals of two of the losing applicants were ploys proferred to garner unjustified comparative preferences.

— *Signal Ministries, Inc.*
MM Docket No. 84-445

FCC 86R-50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SIGNAL MINISTRIES, INC.	MM Docket No. 84-445 File No. BPCT-840103KI
BRUNSON COMMUNICATIONS, INC.	MM Docket No. 84-449 File No. BPCT-8401014KL
BURLINGTON 48, INC.	MM Docket No. 84-450 File No. BPCT-8401014KM

ADELPHI BROADCASTING CORPORATION	MM Docket No. 84-452
For Construction Permit for New Television Station, Channel 48, Burlington, New Jersey	File No. BPCT-840104KO

Appearances

Mark W. Amerman, on behalf of Signal Ministries, Inc.; *Barry D. Wood*, *Diane Z. Goldman*, and *Kenneth D. Shirley*, on behalf of Brunson Communications, Inc.; *Martin R. Leader*, *Kathryn R. Schmeltzer*, and *Janet M. Evans*, on behalf of Burlington 48, Inc.; and *Benito Gaguine* and *Heidi P. Sanchez*, on behalf of Adelphi Broadcasting Corporation.

DECISION

Adopted: August 1, 1986; Released: August 18, 1986.

BY THE REVIEW BOARD; MARINO (CHAIRMAN), JACOBS, AND ESBENSEN.

BOARD MEMBER ESBENSEN:

1. This proceeding now involves the four remaining mutually-exclusive applications of Signal Ministries, Inc. (Signal), Brunson Communications, Inc. (BCI), Burlington 48, Inc. (Burlington 48), and Adelphi Broadcasting Corporation (Adelphi) for authority to construct a new UHF television station to operate on Channel 48 in Burlington, New Jersey. The signal of this station will be capable of being viewed in Philadelphia, the fourth largest television market in the United States.[1] These applications, along with six others that were subsequently dismissed, were designated for consolidated hearing by *Hearing Designation Order*, 49 Fed. Reg. 20549, published May 15, 1984. In an *Initial Decision*, (*I.D.*),

[1] Channel 48 has a rather interesting history. *Inter alia*, a former licensee ceased operating its facility on this channel on August 30, 1983, and voluntarily returned its license to the Commission. The license was cancelled on October 4, 1983. With the channel fallow, the original 10 hopefuls herein filed their applications, all confident, no doubt, that they could succeed where others had failed.

FCC 86D-7, released February 11, 1986, presiding Administrative Law Judge (ALJ) Joseph Chachkin granted BCI's application after concluding that BCI was the superior comparative applicant, and denied the remaining competing applications.[2] The proceeding is now before the Review Board on exceptions filed by the non-prevailing applicants and on contingent exceptions filed by BCI. We have reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held before a panel of the Board on May 19, 1986, and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm his ultimate conclusion that a grant of BCI's application would best serve the public interest, convenience, and necessity.

2. *BCI.* The ALJ credited BCI with 100% fulltime quantitative integration for the proposed participation of Dorothy Brunson, its 100% stockholder, as the station's fulltime general manager, substantially enhanced qualitatively by minority and female credit[3] as well as by Ms. Brunson's extensive broadcast experience which includes, *inter alia*, ownership and management of three broadcast stations. *I.D.*, para. 125. The ALJ also awarded BCI a slight qualitative enhancement credit for Ms. Brunson's proposed move to Burlington, New Jersey. The ALJ attributed no media interests to BCI under the diversification criterion because Ms. Brunson made an unequivocal commitment prior to the "B" cut-off date to divest herself of all ownership and management interests in the broadcast facilities in which she is currently involved. *Id.* at paras. 113-117.[4]

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[2] The *I.D.* also denied the application of Burlington Broadcasters, Ltd. (BBL). In lieu of filing exceptions, BBL requested that the Review Board act on its proposed settlement agreement with BCI and Adelphi that had been filed with the ALJ shortly after the release date of the *I.D.* By *Order*, FCC 86R-10, released March 7, 1986, the Board granted BBL's request and dismissed its application.

[3] Ms. Brunson is a black female. The Commission's policy with respect to female preferences is currently in a state of flux. *E.g., Talleyrand Broadcasting*, 103 FCC 2d 476, 481, 59 RR 2d 563, 567 (Rev. Bd. 1985). In *Steele* v. *FCC*, No. 84-1176 (D.C. Cir. August 23, 1985), the Court set aside the Commission's practice of awarding preferences for female integration. Recently, by *Order* filed October 31, 1985, the Court granted rehearing *en banc* and vacated the panel's holding in *Steele*.

[4] The *I.D.* ordered that the principals of BCI divest themselves of two major-market AM facilities (WEBB, Baltimore) and WIGO (Atlanta), as well as WBMS, Wilmington, North Carolina. Given the less than glorious past of Channel 48 in Burlington/Philadelphia, and the significant costs involved in operating a UHF television facility, especially in a major market, an old adage concerning frying pans and fires comes to mind. However, the choice is BCI's and they may fortuitously prove P. T. Barnum wrong.

3. *BCI's Alleged Misrepresentations:* In attacking BCI's integration showing, Adelphi and Burlington 48 initially devote the major thrust of their exceptions to alleged instances of misrepresentation and lack of candor arising out of Ms. Brunson's oral testimony adduced under the comparative issue concerning her past broadcast experience, duties and "job titles" at Station WWRL(AM), New York, during the mid-1960's. We will address this potentially disqualifying matter first.

4. The ALJ's findings and conclusions with respect to Ms. Brunson's employment at WWRL are set forth in paragraphs 44-50 and 126-128 of the *I.D.*, and include summaries of testimony presented by (1) Ms. Brunson; (2) Egmont Sonderling, then-president of Sonderling Broadcasting Company, the licensee of Station WWRL; (3) Frank Ward, then-general manager of WWRL; (4) Ward's ex-wife, Mary Ann Ward, then an employee at WWRL; and (5) Howard Sanders, an account executive at WWRL during much of the time Ms. Brunson was employed at the station. In essence, the witnesses disagreed among themselves in varying degrees as to Ms. Brunson's job functions and corresponding job titles, and her relative importance in the managerial hierarchy at WWRL. Specifically, Ms. Brunson's description of her job titles and functions set forth in BCI Exh. No. 2 and described by her at hearing (*i.e*, assistant to the comptroller/bookkeeper (BCI Exh. 2, Tr. 791, 1809); comptroller/bookkeeper (BCI. Exh. 2, Tr. 793, 1809); and assistant general manager/assistant to general manager (BCI Exh. 2, Tr. 796, 1882)) was disputed in its entirety by Sonderling and by Frank Ward. Both testified that checks were signed locally by the bookkeeper and the general manager (Tr. 1756, 1768), and that Ms. Brunson never signed any checks for the station (Tr. 1720, 1756, 1768). Instead, they remembered her as only being active in the traffic department or in helping out at the switchboard, and stated that she was merely a clerical person (Tr. 1714, 1716, 1761). Mr. Sonderling, while acknowledging that the head bookkeeper was an important person in the organization, denied that Ms. Brunson was ever bookkeeper at the station (Tr. 1716, 1718). Ms. Ward, on the other hand, confirmed that Ms. Brunson worked as a bookkeeper (Tr. 2027), was responsible for the payroll (Tr. 2041), and may have held the position of head bookkeeper during an interim period when one bookkeeper left and another began (Tr. 2040-2041). She did not remember Ms. Brunson ever acting as a switchboard operator (Tr. 2056). Ms. Ward stated that the station was "not very big" on titles and only used them for

the general manager, sales manager and program director (Tr. 2032). Finally, Howard Sanders testified that Ms. Brunson was one of the bookkeepers when she started (Tr. 1963), that she took the position of her supervisor after a few months (Tr. 1963), that she had the responsibility for signing checks which he remembered receiving (Tr. 1968), and that she was Frank Ward's top assistant because she handled all of the money (Tr. 1974). He said that the station was somewhat "intimate" (Tr. 1966) and that the assistants did not necessarily have titles (Tr. 1974), but that Ms. Brunson had responsibility for the "ongoing day-to-day operation, nuts and bolts," and "for the administrative aspect" (Tr. 1974).

5. The sole contemporary documentary evidence (albeit very significant) submitted by the parties (which was only discovered and offered after the ALJ repeatedly urged the parties to try to locate station business records) was a check drawn on WWRL's bank account with the First National City Bank, dated December 24, 1964, *co-signed by Ms. Brunson*, using her maiden name of Edwards, and by Frank Ward. *I.D.*, para. 50. The check was obviously honored by the bank.

6. The ALJ concluded that the record evidence concerning Ms. Brunson's broadcast experience at WWRL provided no basis for BCI's disqualification. (*I.D.*, paras. 126–128, emphases added):.

> There is no evidence that Ms. Brunson has misrepresented facts to the Commission. No less than six hundred transcript pages have been devoted to a microscopic examination of events occurring at WWRL some 15 to 20 years ago. To the extent that Ms. Brunson may have erred on some detail, it is clear that such error was due to faulty recollection, and not intentional deception. *The presiding judge had countless opportunities to observe Ms. Brunson and is convinced that she testified truthfully at all times.*
>
> Furthermore, Ms. Brunson's testimony as to her responsibilities at WWRL is largely corroborated by two other witnesses, including Mary Ann Ward, who was produced by Adelphi. Also, the only piece of documentary evidence presented on this subject corroborates Ms. Brunson's testimony and directly contradicts the testimony of Mr. Sonderling and Mr. Ward. Thus, the WWRL check dated December 24, 1964, which was co-signed by Ms. Brunson supports her statement that she had the authority to sign checks for the station. It also refutes Mr. Ward's and Mr. Sonderling's assertions that Ms. Brunson did not have check writing authority. This check also supports Ms. Brunson's testimony that she was bookkeeper at WWRL, despite the Sonderling and Ward claims to the contrary.
>
> Aside from the fact that the witnesses called by Adelphi failed to disprove Ms. Brunson's testimony, *there is no conceivable motive for Ms. Brunson to misrepresent her duties at WWRL. The only motive suggested*

by the parties is enhanced broadcast experience credit. That suggestion does not survive reflection. Ms. Brunson's seven years of significant managerial responsibility at Inner City Broadcasting Corporation (WLIB) and her years of experience as an owner/manager already entitle her to the maximum credit for broadcast experience.[5]

7. In excepting to the *I.D.*'s exculpation of BCI, Burlington 48 contends that the ALJ's findings of lack of motive, and of corroboration by Ms. Ward, are contrary to the weight of the record evidence, and it urges the Board to disqualify BCI. Similarly, Adelphi urges BCI's disqualification or at least an elimination of BCI's claimed quantitative integration credit. It urges that the *I.D.* inexplicably failed to consider the written testimony of Ms. Brunson (*i.e.*, BCI Exh. No. 2) which initially led to the disputes concerning her claimed titles, duties, and length of employment, and also charges that the ALJ's findings as to Ms. Brunson's credibility are entitled to no weight whatsoever. Adelphi further contends that a separate misrepresentation issue is unnecessary where blatantly false statements are made before the trier of fact.

8. We will deny these exceptions and adopt the ALJ's sound conclusions. In the absence of patent conflicts with the record evidence, the Commission accords special deference to a presiding officer's credibility findings since the trier of fact has had a superior opportunity to observe and evaluate a witness's demeanor and to judge his/her credibility. *See Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 722, 54 RR 2d 989, 996 (Rev. Bd. 1983) (subsequent history omitted), and cases therein; *accord Broadcast Associates of Colorado,* FCC 86-215, released May 9, 1986, at para. 5 ("absent extrinsic evidence to the contrary ... the ALJ's judgment [based on his observation of the witness's hearing testimony] ... is entitled to great weight"). Such deference is particularly appropriate in this proceeding because the testimony of the five witnesses on this matter spans six hundred transcript pages and involves matters that, with respect to Ms. Brunson's past broadcast experience, occurred some two decades ago. Moreover, as noted, *supra,* the ALJ clearly declared that he "had countless opportunities to observe Ms. Brunson and is

[5] The ALJ further held that there was no basis for a comparative demerit. In any event, under the Commission's recent *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 59 RR 2d 801 (1986), character demerits are not assessed in comparative broadcast proceedings once an applicant is found to possess the basic character qualifications to be a Commission licensee. *See Hampshire County Broadcasting Co., Inc.*, FCC 86-100, released March 20, 1986.

convinced that she testified truthfully at all times." Although BCI Exhibit No. 2 (Ms. Brunson's integration statement) apparently mistakenly indicates 1962 as the date when Ms. Brunson commenced employment with WWRL[6], and while it is perhaps true that Ms. Brunson was more than "uninhibited by modesty," *Horne Industries, Inc.*, 94 FCC 2d 815, 819 (Rev. Bd. 1983), in describing her job titles and relative importance at WWRL[7], it is clear from the testimony of Sanders and, to a large extent, Ms. Ward, that the record evidence supports the essence of Ms. Brunson's testimony concerning her functions at the station. Any major conflicts in testimony over the relative importance of those functions can reasonably be accounted for by the fading memories

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[6] The record reflects the following colloquy between Adelphi's counsel and Ms. Brunson (Tr. 1849-1850):

> Q. Are you positive now that you first went to work for Sonderling Broadcasting in 1962?
>
> A. I'm not positive of that after reading the statement. What I am positive of is I went to work for Sonderling Broadcasting after they bought the station.
>
> * * *
>
> Q. So assuming that they took it over in '64, you started working for Sonderling in '64?
>
> A. If that's when they took it over.

[7] For example, in explaining her reference in BCI Exhibit No. 2 as having worked as assistant general manager of WWRL, Ms. Brunson stated:

> I considered myself as an assistant to Mr. Ward, and that was my responsibility and my job. Tr. 1882.

She further elaborated:

> If I can go back a d again say that during that time I was referred to on many occasions before staff and on -- when I made purchases, when there was a problem I was referred to as Mr. Ward's assistant, as the Assistant General Manager, and especially when it came to problems.
>
> * * *
>
> And I was further amplifying that those titles might have been used depending on the occasions, if I was working heavily in the financial area, or if I was working as related to employee relations, administrative or something like that. Tr. 1936.

In keeping with her image that her functions were "important," Ms. Brunson initially testified that she would meet Mr. Sonderling at the Plaza Hotel for dinner when he came to town and would talk about station operations. Tr. 808. Subsequently, she explained that on occasions, she was asked by Sonderling (and others at WWRL) to hand deliver information to him at the Plaza Hotel *i.e.*, usually at his table on the first day he would arrive in town, and while there he would invite her to sit down and discuss the information and having something to eat. Tr. 1881-1882, 1946-1948. Although we do not condone such obvious self-aggrandizement, these peccadilloes and puffing do not, of course, rise to the level of disqualification.

of the witnesses due to the extensive passage of time (that is, over twenty years), that has since elapsed. Clearly, the WWRL check dated December 24, 1964, co-signed by Ms. Brunson in the first year of her employment at the station, substantially and significantly corroborates Ms. Brunson's version of her functions at WWRL since Sonderling and Frank Ward testified that checks were signed only by the bookkeeper and general manager, and both stated unequivocally that Ms. Brunson was never bookkeeper nor signed checks. In light of the confusion on this matter due to understandable errors in the witnesses' recollections of events occurring two decades ago, we perceive no basis to overturn the ALJ's credibility findings nor find it significant that the ALJ declined to discuss every specific statement contained in BCI Exh. No. 2. Nor do we conclude that it is necessary to comment on the matter of motive, although any motive for deliberately misleading the Commission on this matter is conspicuously weak in light of Ms. Brunson's more recent and extensive managerial broadcast experience elsewhere (set forth in paras. 42-43 of the *I.D.*)[8]

9. Further, even if we were not in complete agreement with the ALJ's credibility findings, we would be reluctant to disqualify BCI on the facts of this case in the absence of a specific misrepresentation issue. The Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 399, 5 RR 2d 1901, 1913 (1965), warns that "[i]n the absence of a designated issue, character evidence will not be taken." *See also West Coast Media, Inc.* v. *FCC*, 695 F2d 617, 620 (D.C. Cir. 1982) (Intent to deceive should not be discussed by the Commission in the absence of a designated misrepresentation issue).[9] The underlying purpose

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[8] Burlington 48 also charges that Ms. Brunson "lied" at hearing concerning an article appearing in the June 1984 issue of "Essence" magazine entitled "How I Made A Million" by Lloyd Gite. The article was about black women who have become millionaires and included a biographical sketch on Ms. Brunson. The article also noted that her future plans included buying two more radio stations and a commercial television station "this year." Burlington 48 challenges the veracity of Ms. Brunson's explanations regarding the preparation of the article including the number of phone calls and length of time for the interview (*i.e.*, 15 or 20 minutes versus 49 minutes), her impression of the credentials of the interviewer, and the context of the remarks regarding her future plans. We have reviewed the testimony of Ms. Brunson in light of Mr. Gite's (the author of the article) testimony, and conclude, as the ALJ apparently concluded with respect to Ms. Brunson's veracity, that the minor discrepancies in their testimony are *de minimis*.

[9] Adelphi is correct as a general proposition that truth and candor are always in issue. *See e.g., Old Time Religion Hour, Inc., supra*, at 719, 54 RR 2d at 994 (Rev. Bd. 1983). "Thus, an applicant may be disqualified for lack of candor where it occurs 'before the judge's own eyes,' *id.*, quoting *RKO General, Inc.* v.

of this policy, as articulated by the Commission, is "to avoid unduly prolonging the hearing process" and "to avoid those situations where an applicant converts the hearing into a search for his opponents' minor blemishes, no matter how remote in the past or how insignificant." *Policy Statement*, *supra*, at 399, 5 RR 2d at 1913. The wisdom of this policy is amply demonstrated by the record in this case which revolved around events which occurred many years ago. Certainly, a separate issue here would have eliminated the inherent unfairness experienced by Ms. Brunson when her testimony concerning non-decisional events occurring in the 1960's was spotlighted, subjected to microscopic scrutiny, and strenuously challenged by her competitors. *See Adell Broadcasting Corp.*, *supra*, at 482, 57 RR 2d at 310 (Rev. Bd. 1984) ("Given the ingenuity of counsel and the zeal with which they urge their causes, it will be the rare case in which witness testimony cannot be subjected to attack (however frivolous in fact) at the conclusion of the case on grounds that the witness lied or was less than forthcoming in his testimony"). Moreover, a separate issue would have narrowed the focus of the inquiry, assuming that a *prima facie* showing could have established that such an inquiry was necessary, and afforded the parties an opportunity to prepare a full, less rambling, and more conclusive case. Instead, we are presented with six hundred pages of testimony of witnesses, all of whom vaguely (and understandably so) recollect the events differently, and only one relevant document contemporary with the events.[10] In sum, based on the ALJ's credibility findings, our own examination of the record, and the lack of a separate misrepresentation issue, we conclude that the allegations fail to serve as a basis for disqualifying BCI or

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FCC, 670 F. 2d 215 (D.C Cir. 1981) or for false testimony since specific notice to an applicant that he must testify truthfully is superflous. *Id.*" *Adell Broadcasting Corp.*, 99 FCC 2d 477, 482, 57 RR 2d 307, 310, *rev. denied*, FCC 85-382, released July 26, 1985, appeal pending *sub nom. Michigan Channel 38, Inc. v. FCC*, No. 85-1527 (D.C. Cir. filed August 23, 1985). Of course, a lack of candor on the part of Ms. Brunson, even in the absence of an issue, could lead to the sanction of disqualification. *See Mid-Ohio Communications, Inc.*, FCC 86R-41, released July 9, 1986, at para. 44 relying on *RKO General, Inc., supra*. That Court, however, cautioned the Commission that such misconduct "should be of such a blatant and unacceptable dimension that its existence cannot be denied." *RKO General, Inc., supra* at 232. Here, the case involves alleged misrepresentations more than an alleged lack of candor. In any event, in light of the ALJ's strong credibility findings, a lack of candor has not been demonstrated with the certainty called for by the Court in *RKO General, Inc.*

[10] This significant document (the check co-signed by Ms. Brunson) was only placed into evidence after the hearing sessions had been completed, at the urging of the ALJ.

diminishing its quantitative integration credit.

10. *BCI Integration and Diversification Allegations:* On other grounds, Adelphi would reduce BCI's fulltime quantitative integration credit to 51%. Moreover, both Adelphi and Burlington 48 would assess BCI a diversification demerit. By way of background, the ALJ found that the First Small Business Investment Company of California (FSBIC), a small business investment corporation, holds two convertible debentures that permit it to acquire up to 49% of the authorized shares of BCI. The debentures represent a debt of $400,000 incurred in connection with BCI's acquisition of WEBB(AM), Baltimore, Maryland. (*I.D.*, para. 38). Additionally, a subsidiary of FSBIC's parent company is a 6.33% limited partner in WBC Associates, L.P., a 90% owner of the licensee of six broadcast facilities located in New Jersey, New York, Washington, Michigan, North Carolina, and Florida. (BCI Exh. 18.) Adelphi baldly asserts that BCI's quantitative integration credit must be reduced by the 49% convertible interest held by FSBIC because FSBIC will not be integrated into station operations, and that the media interests of FSBIC's parent company's other subsidiaries must be assessed against BCI in light of the Commission's attribution policies. Moreover, Adelphi would not credit BCI's commitment to divest itself of the three stations it now owns in light of Ms. Brunson's alleged representations concerning her future plans outlined in an article in the June 1984 issue of "Essence" magazine (*i.e.*, buying two more radio stations and a commercial television station *see* 8, *supra*) and BCI's alleged failure to live up to prior commitments made to the Commission when seeking a rule waiver for WEBB to provide the first black-owned nighttime facility to the city of Baltimore. Adelphi adds that the Commission may well deny any sale of WEBB to a non-minority owner. Burlington 48 also questions BCI's divestiture commitment asserting that it would be impracticably expensive for BCI to divest itself of its facilities in light of the debentures held by FSBIC and that even if Ms. Brunson can divest, the result will be a net loss in black-owned broadcast stations since Ms. Brunson will be divesting herself of three stations to obtain one.

11. These exceptions are similarly without merit. The Board has previously observed that under the comparative issue the Commission will take cognizance of conversion rights (such as options) adverse to the interests of an applicant in the absence of evidence that the convertible interests will not be exercised. *See Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1366

(Rev. Bd. 1983). Thus, in *Radio Laredo, Inc.*, 87 FCC 2d 353, 49 RR 2d 1489 (Rev. Bd. 1981) (subsequent history omitted), we attributed to an applicant under the diversification criterion the media interests of its proposed general manager who held an option to acquire a 20% interest in the applicant. There was no evidence that the option holder would not exercise his option. Where, however, it is unlikely that a convertible interest will be exercised, the potential ownership interest will have no impact on the comparative analysis. *Cf. Washington's Christian TV Outreach*, 99 FCC 2d 395, 410-414, 56 RR 2d 1539, 1554-1555 (Rev. Bd. 1984), *rev. denied* FCC 85-501, released September 16, 1985, *appeal pending sub nom. Washington's Christian Television Outreach, Inc.* v. *FCC*, No. 85-1649 (D.C. Cir. filed October 10, 1985). The Board noted in *Washington's Christian TV Outreach*, *supra*, at 414 n. 68, 56 RR 2d at 1555 n. 68, that the Commission's Report and Order in *Attribution of Ownership Interests*, 97 FCC 2d 997, 1021-1022, 55 RR 2d 1465, 1484 (1984) held that "various convertible interests such as non-voting stock, warrants, or debentures are not cognizable as ownership interests '[i]f the contingency upon which the conversion right rests is beyond the control' of the holder." In the instant case, the potential acquisition of BCI stock by FSBIC does not have any bearing on BCI's integration or diversification showings because Ms. Brunson has established on the record that she has the power to extinguish FSBIC's conversion and/or purchase rights, and intends to do so (BCI Exh. 8, p. 17; Tr. 888-889). Additionally, the fact that FSBIC is a business investment corporation, which is primarily interested in financial profit, makes it highly unlikely that it would be interested in exercising control over BCI stock unless, as would be the case with any other lender, it deemed its loan to be in jeopardy because of station performance. BCI, therefore, is entitled to 100% fulltime quantitative integration credit.

12. Moreover, Ms. Brunson's broadcast plans as expressed in the June 1984 issue of "Essence" magazine, and her alleged failure to construct nighttime operations at WEBB, are insufficient to discredit her divestiture commitment regarding her current broadcast facilities. The magazine interview took place on December 13, 1983, *prior to BCI's filing for the Burlington facility and to Ms. Brunson's divestiture commitment made in March 1984.* As the ALJ cogently noted (*I.D.* para. 113; emphasis added):

> The article states that "Dorothy's future plans included buying two more radio stations and a commercial television station this year and beginning to build a cable television system." This sentence, however, is of no significance . . . *[T]hat statement is consistent with Ms. Brunson's broadcast ownership on December 13, 1983, the date the interview took place.* At that time, Ms. Brunson had not yet filed her application for Channel 48 or had she yet acquired WBMS in Wilmington, North Carolina. Also, she still had an application pending for a new FM radio station in Newark, New Jersey, which she subsequently dismissed. Since her acquisition of WBMS, Ms. Brunson has not entered into any negotiations looking toward the acquisition of any other station (Tr. 921). She has no present plans to do so (Tr. 917). *Moreover, the other parties overlook the fact that Ms. Brunson made her divestiture commitment long after the Gite telephone interview.* Thus, even if she had intended, prior to the filing of the Burlington application, to acquire other stations, that has no bearing on what her intent has been since she made the divestiture commitment. Thus, the statement from the magazine article cannot be deemed to contradict Ms. Brunson's unequivocal divestiture commitment.

With respect to WEBB, BCI reports that it has completed the construction of its nighttime facilities and expects to commence operations soon after grant of an augmentation application pending since April 28, 1986. (Statement Pursuant to Section 1.65 filed May 6, 1985 by BCI.) In any event, the ALJ held that it was unnecessary to decide whether the commitment was credible because a grant of BCI's application would be conditioned on the fulfillment of its divestiture commitment. He attached such a condition to his grant of BCI's application, and we will also similarly attach such a condition herein. Finally, with respect to the remaining diversification arguments against BCI, we find that they are adequately and correctly analyzed in the *I.D.*, (paras. 114-117) and need no further comment herein. BCI will not be assessed a diversification demerit.[11]

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[11] On July 10, 1986, BCI filed a statement pursuant to Section 1.65, notifying the Review Board that Ms. Brunson had acquired on June 25 and sold on July 3, 1986, 3.8% of the voting stock of Universal Telecom, Inc., the sole general partner of United Cable Television of Baltimore Limited Partnership, a franchisee of an unbuilt cable system in Baltimore, Maryland. The statement further noted that Ms. Brunson had been elected to the Board of Universal Telecom, Inc. on March 31, 1986 but has since resigned. The stock interest will not be attributed to BCI because Ms. Brunson divested herself of the interest within thirty days. *See Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 795-796, 57 RR 2d 662, 675 (Rev. Bd. 1984) subsequent history omitted)(divestiture sufficiently contemporaneous with acquisition to ward off diversification demerit); *Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1221-1222, 57 RR 2d 1984, 1196 (Rev. Bd. 1984). With respect to Ms. Brunson's position on the Board, it is not clear from BCI's statement how long she retained that position but, in any event, the non- ownership interest is too

13. *Adelphi.* The ALJ awarded Adelphi 33.6% fulltime quantitative integration credit after rejecting the applicant's putative corporate structure under which 100% integration credit was sought. (*I.D.*, para. 135.) He also declined to attribute any media interests to Adelphi because all of its principals with cognizable media interests committed to divest themselves of those interests. (*Id.* at para. 111.) The ALJ set forth in detail his findings and conclusions (I.D., paras. 86-109 and 135-139) concerning the business structure and comparative claims of the applicant. Briefly, Adelphi is a corporation consisting of three voting stockholders, all of whom are female and black, and three "non-voting" stockholders, all of whom are similarly female but non-minorities. Integration credit was only sought for the voting stockholders, although all six of the principals have in the past, and will in the future, actively participate fulltime at the proposed station. Based on the past and proposed participation of all of the stockholders, the ALJ concluded that the corporate structure limiting the voting stock and quantitatiave integration credit to those entitled to minority enhancement credit was a sham formulated solely for the purpose of achieving a favorable litigation posture, and that all of the stock would have to be recognized for integration purposes as voting stock. (*Id.* at paras. 137-138.) He declined to credit the integration proposals of the non-voting stockholders, however, because Adelphi did not seek comparative credit for those individuals before the "B" cut-off date. (*Id.* at para. 138.) The 33.6% attribution figure arrived at by the ALJ for Adelphi's quantitative integration credit represents the equity interests of the voting shareholders at the time the *I.D.* was prepared.

14. Adelphi contends in its exceptions that its corporate structure is *bona fide*, and argues that an applicant may validly choose to structure itself, as it has done here, for reasons unrelated to the Commission's integration policies and that, therefore, it was error for the ALJ to diminish its quantitative integration credit. It argues that while its non-voting stockholders have actually participated in corporate matters, only the voting stockholders have been permitted to vote. Adelphi further contends that the ALJ also erred in failing to credit the integration proposals of the non-voting stockholders if the applicant is to be awarded integration credit on the basis of equity rather than

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insignificant and remote to be accorded significance as a comparative factor in this proceeding. *Cf. Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1265, 52 RR 2d 1063, 1068 (1982)(subsequent history omitted).

voting power. It argues that prior to the "B" cut-off date, its application fully disclosed the intentions of all six shareholders to work fulltime at the station. Counsel for Adelphi also suggested at oral argument before the Board that we should pierce the corporate veil in this and every other similar case. (Tr. 2098.) In sharp contrast, BCI contends that Adelphi's corporate structure is a *de jure* as well as a *de facto* sham because Adelphi's original certificate of incorporation authorized only one class of stock and that it was not until after the "B" cut-off date that Adelphi amended its certificate to provide for the separate and non-voting stock. BCI also charges that it was error for the ALJ to accept Adelphi's amendment of its application to reflect the amended certificate because it was impermissible upgrading. Both BCI and Burlington 48 urge in their exceptions that Adelphi be stripped of its entire quantitative integration credit. Finally, Burlington 48 would also assess Adelphi a diversification demerit for the cable television interests of principal Beverly Harper, a 25% voting shareholder, because her divestiture commitment occurred after the "B" cut-off date.

15. We agree with the ALJ that for integration and diversification purposes, Adelphi's organizational structure is unrealistic and must be considered a ploy by the applicant to secure greater minority enhancements in an effort to prevail comparatively over the competing applicants. It is well established that the Commission may look beyond an applicant's actual organizational structure to determine true ownership and control. *See KIST Corp.*, 99 FCC 2d 173, 181-189, 57 RR 2d 49, 55-61 (Rev. Bd. 1984), *modified*, 58 RR 2d 1483 (1985); *N.E.O. Broadcasting Company*, 103 FCC 2d 1031 (Rev. Bd. 1986). Moreover, because the purposes underlying our comparative policies differ from those of the state in regulating business entities, our analysis is not necessarily complete merely because the organizational structure chosen by the applicant technically complies with the formalities of state law. *See Cotton Broadcasting Co.*, FCC 86R-42, released July 7, 1986; *Bradley, Hand and Triplett*, 89 FCC 2d 657, 662-663, 51 RR 383, 387 (Rev. Bd. 1982). Thus, in the instant case, Adelphi's claim that it must be given 100% quantitative credit because its corporate structure was based on allegedly valid reasons, other than our comparative policies, is not persuasive. Similarly, we do not base our resolution of this matter on the fact that Adelphi's original certificate of incorporation failed to provide the two

voting classes.[12] Rather, the pertinent consideration here is whether it appears from the record that the corporate structure presented by Adelphi warrants our confidence that the participation of the voting stockholders in the station's operations will be consistent with the purposes underlying the integration criterion; that is, strengthening the link between legal responsibility and day-to-day managerial authority. *KIST Corp.*, *supra*, 58 RR 2d at 1485; *Policy Statement on Comparative Broadcast Hearings*, *supra*, at 395, 5 RR 2d at 1909. A corollary to this formulation is that the quantitative integration credit otherwise due to an applicant must be proportionately diminished to the degree the voting stockholders' exclusive authority to manage and control the corporation and operation of the station is reduced by the station involvement of ostensibly non-voting stockholders. *Cf. Family Media, Inc.*, 102 FCC 2d 752, 59 RR 2d 165 (Rev. Bd. 1985) (proceeding remanded to determine whether limited partner exercises sufficient control over the applicant that he should be included when evaluating its integration proposal). Here, the ALJ found that the non-voting stockholders had participated in the affairs of the corporation to the same extent as the voting stockholders; that is, the non- voting stockholders were the impetus behind the formulation of the group and had the primary role in organizing the entity, communicating with counsel, and representing the corporation. (*I.D.*, para. 137.) They participated in all discussions of substantive corporate matters, and will hold the positions of station manager, program director, and marketing director, respectively, at the proposed station. (*Id.* at paras. 100, 137.) Additionally, the testimony of Ms. Beverly Harper, an Adelphi voting stockholder, is instructive regarding this matter:

> Well, in trying to respond to the way that the FCC has -- the criteria that the FCC has developed in this kind of proceeding, that we were forced to make some choices about how we would structure ourselves. And yes, in a lot of the cases we do operate as a group of six and we do talk about things and have input from everybody. But in trying to be consistent with the FCC in making this, if you will, *almost false distinction between those who vote and those who don't, that we were forced into – we were almost forced into setting up this way of operating.* But we are a group of six people who have a lot of respect for one another's opinions and *we wanted to make our application the strongest possible application and so we did what we thought was necessary to do that.* (Tr. 1291–1292); emphases added).

[12] In this regard, we note that Adelphi argues that its By-Laws prior to the "B" cut-off date reflected that there would be two classes of stock. The exception to the ALJ's acceptance of Adelphi's amendment reporting the change in the certificate of incorporation is denied as being of no decisional significance.

16. In light of the totality of the circumstances, and the fact that the participation, both past and proposed, of the non-voting stockholders is so thoroughly intertwined with the participation of the voting stockholders, we agree with the ALJ that the scope of the integration analysis should not be limited to the three voting stockholders, even assuming, *arguendo*, that Adelphi has structured its application so that only the voting stockholders are permitted to cast their ballot.[13] Although refreshing and commendable in its disclosure, Adelphi's proposal is, however, unrealistic, and the ALJ correctly concluded that all of its principals must be included in evaluating the extent of the credit Adelphi's integration proposal deserves.[14] Similarly, the ALJ was also correct in refusing to award the applicant quantitative integration credit for the station participation of its non-voting stockholders. As noted by the ALJ, Adelphi did not seek such credit on or before the "B" cut-off date or even at the hearing proceedings (Tr. 187) and its exhibit describing their duties was received into evidence by the ALJ only for purposes of impeaching the credibility of the integration proposals of the voting shareholders and not for comparative purposes. (*I.D.*, para. 138.) Having prosecuted its application on one theory, Adelphi cannot at this late stage of the proceeding choose an alternative that may produce better results. *See Commercial Radio Institute, Inc.*, 78 FCC 2d 1016, 1030, 47 RR 2d 1307, 1317-1318 (Rev. Bd. 1980); *cf. Independent Masters, Ltd.*, FCC 86R-33, released May 23, 1986, paras. 3-8. Thus, we affirm the ALJ in all major respects except with regard to the percentage of quantitative integration credit awarded Adelphi. BCI points out in its exceptions that the equity interests of the voting stockholders have diminished since the hearing, and it argues that the percentages will continue to change as the applicant issues stock to raise additional funds to

[13] We will deny the exceptions raised by both BCI and Burlington 48 that the positions proposed by the Adelphi principals are either non-managerial or fail to conform with the normal responsibilities associated with the job titles. The *I.D.* lists the managerial duties each proposes to have at the station. *I.D.* paras. 105, 108.

[14] Neither *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989, 55 RR 2d 926, 930 (1984) nor *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 57 RR 2d 440 (Rev. Bd. 1984), cited by Adelphi in its brief, dictate a contrary result. In *Greater Wichita*, the question presented was whether a limited partner working at a broadcast station could receive integration credit. No credit was given because the limited partners did not have any authority to participate in the management and control of the business. That case lends no support for legitimizing Adelphi's creative corporate structure. In *Metro Broadcasting*, unlike here, there was no showing that the non-voting stockholders did anything other than merely attend shareholder meetings.

prosecute its application. Although we reject exceptors' contentions that Adelphi's entire quantitative integration credit be discounted[15], we need not reach the question whether Adelphi's quantitative credit is 33.6%, based on the principals' equity interests, or 50% based on the fact that half of the principals are entitled to credit, because with either percentage Adelphi would lag far behind BCI's 100% quantitative integration credit. No diversification demerit will be assessed against Adelphi, as urged by Burlington 48, because of the cable television interest of Ms. Harper since Ms. Harper's commitment to divest occurred prior to the date she actually acquired the interest. *See Washington's Christian Television Outreach, Inc., supra*, FCC 85-501 (divestiture pledge made prior to acquisition of the interest credited).

17. *Burlington 48 and Signal.* In light of our ultimate conclusion that BCI is entitled to 100% fulltime quantitative integration credit and charged with no attributable media interests, we need not reach the respective exceptions raised by Burlington 48 and Signal concerning their comparative qualifications, because even if their exceptions were granted, neither applicant could prevail comparatively over BCI on either the integration or diversification criterion. Burlington 48 seeks at most only 56.5% fulltime quantitative integration credit, and thus even if it were qualitatively superior, BCI would still be entitled to a moderate integration preference.[16] *See Northland Communications*, 100 FCC

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[15] *Hispanic Owners, Inc.*, 99 FCC 2d 1180, 57 RR 2d 695 (Rev. Bd. 1985), cited by the exceptors for support for stripping all quantitative credit from Adelphi is not controlling. There, the Board stated that it was unncessary to determine whether the applicant was entitled to credit for the integrated voting stockholders since the applicant was still comparatively inferior, and such determination would require additional scrutiny to ascertain whether the integration commitments were realistic.

[16] We also believe that one other aspect of Burlington 48's integration proposal requires some comment: the commitments of John L. Harrison, Jr., Burlington 48's proposed operations manager and a 24% stockholder, and James R. Smith, its proposed general manager and a 24% stockholder. The ALJ refused to credit either proposal, primarily because of a Stock Transfer Restriction Agreement under which Chesapeake Television, Inc. (CTI), a 1% stockholder here, retains the right to repurchase after a two-year period up to two-thirds of Messrs. Harrison and Smith's stock. Inclusion of the latter would substantially enhance Burlington 48's integration proposal because they would bring to the applicant qualitative credit for minority and local residence in addition to their quantitative integration. The ALJ characterized this ownership arrangement as a sham, finding that Julian Smith, president and 17% stockholder of Burlington 48, never intended for Messrs. Harrison and Smith to be true owners of the station as demonstrated by the right of CTI, which is controlled by Julian Smith, to repurchase the stock. Burlington 48, however, argues that the two-year period provides more stability than what is required by the Commission's Rules. We conclude that the ALJ properly rejected the proposals

2d 914, 58 RR 2d 825 (Rev. Bd. 1985) *rev. denied*, FCC 86-106, released March 14, 1986. (100% vs. 57.1% merits moderate preference). *See also Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (Rev. Bd. 1981), *rev. dismissed*, 50 RR 2d 1433 (1982) (qualitative attributes may not overcome a clear quantitative difference); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850, 50 RR 2d 1117, 1133 (Rev. Bd. 1981) (subsequent history omitted) (12.5% quantitative we hold that difference held to be "clear"). Moreover, Burlington 48 was assessed a moderate-to-substantial diversification demerit, which Burlington 48 seeks to reduce to a moderate one. Thus on both criteria, Burlington 48 falls short comparatively of catching BCI.[17] Similarly, Signal trails behind BCI because it seeks, at most, 60% fulltime and 20% parttime quantitative integration credit; and it was assessed a moderate diversification demerit which it urges should be reduced to a slight-to-moderate demerit. *See Leflore-Dixie, Inc.*, 100 FCC 2d 331, 57 RR 2d 1155 (Rev. Bd. 1985) (100% vs. 60% entitled to moderate integration preference); *see also Georgia Mountain Corp.*, 57 RR 2d 1020 (Rev. Bd. 1985), *review den.*, FCC 85-559, released October 18, 1985 (applicant with moderate integrate preference and very slight diversification preference superior comparative applicant). Therefore, Signal, too, falls short of BCI on both criteria.

18. *Final Comparison.* All decisionally significant exceptions have been considered.[18] The misrepresentation and lack of candor allegations leveled against BCI have been found to be groundless.

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of Messrs. Harrison and Smith. The Commission's *Policy Statement on Comparative Broadcast Hearings, supra*, 1 FCC 2d at 395 n 6, 5 RR 2d at 1909, n 6, emphasizes that "it is important that integration proposals be adhered to on a permanent basis." That deficiency is fatal here. Morever, the stock transfer agreement suffers from the flaw noted in para. 11, *supra*, concerning convertible interests where the conversion right resides within the control of the entity desiring to purchase the interest in the applicant. *Cf. Caldwell Broadcasting Corp.*, FCC 86-245, released May 15, 1986 at para. 5. Burlington 48 would be entitled, however, to the percentage of stock that is not subject to the transfer agreement (*i.e.* 1/3 of 24% or 8% for each individual).

[17] Burlington 48 also excepts to the failure of the ALJ to add a "minority sensitivity issue" in this proceeding. (Tr. 2076-2080) In light of the foregoing conclusions with respect to the application of Burlington 48, the argument is obviously moot. We might hasten to add, however, that Burlington 48 has not demonstrated much "sensitivity" to the mandates of the Commission. See note 16, *supra*.

[18] In light of our disposition here, we have not considered BCI's exceptions regarding the ALJ's failure to add reporting, misrepresentation and lack of candor issues against Adelphi or his failure to award BCI an auxilliary power preference.

Additionally, BCI is superior to all of the applicants under the integration criterion and equal to Adelphi under the diversification criterion. The comparative balance therefore clearly favors BCI and a grant of its application will better serve the public of Burlington, New Jersey.

19. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, filed March 25, 1986, by Adelphi Broadcasting Corporation IS GRANTED and the amendment IS ACCEPTED; that the motion for leave to file out of time, filed April 4, 1986, by Brunson Communications, Inc. IS GRANTED; that the petitions for leave to amend, filed April 7 and May 29, 1986, respectively, by Burlington 48, Inc. ARE GRANTED and the amendments ARE ACCEPTED; and that the motion to correct transcript, filed June 5, 1986, by Brunson Communications, Inc. IS GRANTED; and

20. IT IS FURTHER ORDERED, That the application of Brunson Communications, Inc. (File No. BPCT-840104KL) for a construction permit to establish a new television station at Burlington, New Jersey IS GRANTED, and the applications of Signal Ministries, Inc. (File No. BPCT-840103KI), Burlington 48, Inc., (File No. BPCT-840104KB), and Adelphi Broadcasting Corporation (File No. BPCT-840104KO) ARE DENIED; and

21. IT IS FURTHER ORDERED, That the grant of Brunson Communications, Inc., IS CONDITIONED as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Dorothy E. Brunson, Clyde Porter and Naomi Campor have divested themselves of all interest in and connection with Brunson Broadcasting Co. of Maryland, Inc., licensee of AM station WEBB, Baltimore, Maryland, Brunson Broadcasting Co. of Georgia, Inc., licensee of AM station WIGO, Atlanta, Georgia, Brunson Broadcasting Co. of North Carolina, Inc., licensee of AM station WBMS, Wilmington, North Carolina, and any broadcast station acquired prior to the final grant of this application.
>
> Prior to construction of the tower authorized herein, permittee shall notify AM station WPGR so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and prior to

or simultaneous with the filing of the application for a license to cover this permit, the results submitted to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

ERIC T. ESBENSEN, *Member, Review Board*

FCC 86D-7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SIGNAL MINISTRIES, INC.	MM Docket No. 84-445 File No. BPCT-840103KI
BRUNSON COMMUNICATIONS, INC.	MM Docket No.84-449 File No. BPCT-840L04KL
BURLINGTON 48, INC.	MM Docket No. 84-450 File No. BPCT-840104KM
BURLINGTON BROADCASTERS, LTD.	MM Docket No. 84-451 File No. BPCT-840104KN
ADELPHI BROADCASTING CORPORATION	MM Docket No. 84-452 File No. BPCT-840104KO
For Construction Permit for New Television Station, Channel 48, Burlington, New Jersey	

Appearances

Mark W. Amerman, on behalf of Signal Ministries, Inc.; *Barry D. Wood, Diane Z. Goldman*, and *Kenneth D. Shirley*, on behalf of Brunson Communications, Inc.; *Martin R. Leader, Kathryn R. Schmeltzer*, and *Janet M. Evans*, on behalf of Burlington 48, Inc.; *Joseph A. Godles* and *Henry Goldberg*, on behalf of Burlington

Broadcasters, Ltd.; *Benito Gaguine* and *Heidi P. Sanchez*, on behalf of Adelphi Broadcasting Corporation; and *Brian P. Kilbane*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACKHKIN

Issued: February 5, 1986; Released: February 11, 1986

Preliminary Statement

1. By Hearing Designation Order, MM-4088, released May 11, 1984 (49 Fed. Reg. 20549, published May 15, 1984), the Commission designated for hearing ten mutually exclusive applications for a new commercial UHF television station on Channel 48 at Burlington, New Jersey. Five of the applications have been dismissed, leaving the following five applicants: Signal Ministries, Inc. (Signal), Brunson Communications, Ind. (BCI), Burlington Broadcasters, Ltd. (BBL), Adelphia Broadcasting Corporation (Adelphi) and Burlington 48. Inc. (Burlington 48). The issues designated by the Commission pertaining to these applicants are as follows:

1. To determine with respect to Burlington Broadcasters, Ltd.

(a) The number, identity and qualifications of the partners of Burlington Broadcasters, Ltd.

(b) Whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant complied with Section 73.3514(a) of the Commission's Rules; and

(c) In light of the evidence adduced pursuant to the foregoing issues, the effect of any omissions on the applicant's basic or comparative qualifications.

(2) To determine with respect to Signal Ministries, Inc. and Brunson Communication, Inc. whether good cause exists for locating the main studio outside the principal community to be served and, if so, whether it would be consistent with the public interest.[1]

(3) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. The Commission ordered that any grant of Burlington 48's

[1] By *Order*, FCC 84M-3618, released August 20, 1984, the main studio issue was summarily resolved in favor of Signal and BCI.

application will be conditioned as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that John L. Harrison has divested himself of all interest in and connection with Comcast Cablevision of Philadelphia, Inc.

3. The prehearing conferences in this proceeding were held on July 11 and August 16, 1984. An admission session was held on October 18, 1984. Hearing sessions were held on October 23-26, October 29-31, and December 21, 1984 and on January 4, 1985. The record was closed on January 4, 1985. See Order released January 14, 1985 (FCC 85M-219). The record was subsequently reopened and finally reclosed on May 30, 1985. See Order released May 30, 1985 (FCC 85M-219). Proposed findings of fact and conclusions of law were filed on March 8, 1985 and replies were filed on March 22, 1985.

Findings of Fact

BBL Ownership Issue

4. When it designated Issue (1) against BBL, the Commission provided the following explanation concerning the necessity for the issue:

> In response to Section II, Item 5(a), FCC Form 301, Burlington Broadcasters, Ltd. (BBL), provided a list of its partners totalling 68 percent equity. The remaining 32 percent was to be furnished in a forthcoming amendment. The Commission is not in receipt of the amendment. Section 73.3514(a) requires applicants to provide all information called for by the FCC form, unless the required information is inapplicable. Accordingly, appropriate issues will be specified to determine the identity and qualifications of the unidentified partners and to examine BBL's compliance with Section 73.3514(a). (Designation Order, para. 10).

5. BBL filed its application on January 4, 1984 (BBL Ex. 5, p. 1; Tr. 1056). Table I of the application attributed 68.5 percent of BBL's equity to the partners shown therein, who were all of BBL's partners as of the filing date (BBL Ex. 5, p. 1; Tr. 1056). Robert Barnett was listed as a general partner with a 12 percent interest and Gordon MacInnes was listed as a general partner with an 8 percent interest (Tr. 1057). Table I further states that information concerning the holders of the "remaining equity" in BBL would be furnished in a further amendment (BBL Ex. 5, p. 2). According to BBL's general partners, the definition of the term "equity holder" includes general partners (Tr. 1105, 1199). BBL's Limited Partnership Agreement provides that the term

"general partner" is to "mean, initially, Robert Barnett and Gordon A. MacInnes." (BCT Ex. 10 § 1.1(b).

6. BBL's general partners intended, at the time of the filing of the application, to solicit additional limited partners and "reserved" 31.5 percent of BBL's equity for this purpose (BBL Ex. 5, p. 2). It was for this reason that BBL's application reported the holders of 68.5% of BBL's equity, and stated that BBL would furnish additional ownership information by amendment. *Id.*

7. On March 12, 1984, John P. Hellstrom, Jr. became a 4.5% limited partner in BBL. *Id.* BBL reported this change in an amendment dated April 10, 1984. *Id.* During this time, BBL's general partners continued to meet with investors who might become limited partners in BBL. *Id.* In June 1984, BBL's general partners decided to allocate the remaining 27% of BBL's equity to its existing limited partners. *Id.* This fact was reported in an amendment to BBL's application on June 27, 1984. *Id.*

Standard Comparative Issue

Areas and Populations

8. In Its Hearing Designation Order in this proceeding, the Commission stated that the areas and populations which would be within the predicted Grade B contour of each applicant, together with the availability of other television service of Grade B or greater intensity, would be considered under the standard comparative issue (Designation Order, para. 9). At the Admission Session held October 18, 1984, the parties stipulated that all of the areas within the predicted Grade B signal contours of each of the applicants in the above-captioned proceeding currently receive predicted Grade B service or better from at least six existing commercial television services. No comparative preference is claimed by any of the applicants for coverage of unserved or underserved areas, and the parties agreed that there is no significant difference between the areas and populations to be served by each of the applicants (Tr. 172).

Signal Ministries, Inc.

9. Signal is a non-stock corporation organized under the laws of the State of New Jersey (Signal Ex. 1). The members of the corporation's board of trustees control the corporation; each trustee has an equal vote. *Id.* The officers and trustees of the corporation are as follows:

Name	*Office*	*Trustee*
R. Russell Bixler	President	Yes
David F. Kelton	Executive Vice President and Executive Trustee	Yes
Oleen Eagle	Secretary	Yes
Abraham E. Fenton	Vice President	Yes
Dorothy J. Harris	Vice President	Yes
Verle G. Faust	Treasurer	No

(Signal Exs. 1, 8).

10. Western Pennsylvania Christian Broadcasting Company (Western Pennsylvania) initially field the Signal application, but it assigned its interest in the application to Signal by the "B cut-off" date. Signal amendment, filed March 9, 1984. Western Pennsylvania is a non-member non-stock corporation governed by a four member Board of Directors (Signal Ex. 2). Russell Bixler, David Kelton, and Oleen Eagle are directors of Western Pennsylvania. Mr. Bixler is also President, Chief Executive Officer and Chairman of the Board of Western Pennsylvania. Ms. Eagle is also General Manager, Vice President and Secretary of Western Pennsylvania. Mr. Verle G. Faust, Signal's treasurer, is also treasurer of Western Pennsylvania (Signal Exs. 2, 8).

Diversification

11. Signal has no interest in or connection with any medium of mass communications (Signal Ex. 2). Western Pennsylvania is the licensee of WPCB-TV, Greensburg, Pennsylvania and the permittee of WKBS-TV, Altoona, Pennsylvania. Western Pennsylvania intends to operate WKBS-TV as a satellite of WPCB-TV. *Id.* WPCB-TV's Grade B contour encompasses 5,940 square miles and 2,804,779 persons (Signal Ex. 7). WKBS-TV's Grade B contour will encompass 7,407 square miles and 725,316 persons.[2]

Integration

12. Signal proposes full-time integration of trustees David F. Kelton, Abraham E. Fenton and Dorothy J. Harris; it proposes part-time integration of trustee R. Russell Bixler.

[2] See Order, FCC 2274, released May 30, 1985.

R. Russell Bixler

13. Mr. Bixler proposed to be integrated part-time (at least twenty hours per week) as Signal's Director of Public Relations and Director of Ministries (Signal Ex. 3, p. 1). Mr. Bixler lives in Pittsburgh. He proposes to maintain Pittsburgh as his residence but to establish a second residence in Burlington (*Id.*; Tr. 217).

14. Mr. Bixler stated that, as Director of Public Relations, he will deal with the press and the public (Signal Ex. 3, p. 1). Mr. Bixler's role at the station would be "chief information officer" (Tr. 294). Mr. Bixler stated that, as Director of Ministries, he will supervise the counseling coordinator, the coordinator's assistants, and the telephone counselors at the station (Signal Ex. 3, p. 1). The counseling coordinator, however, will have the day-to-day responsibility for recruiting and training the counselors (Tr. 225). Mr. Bixler's position at the station will involve a lot of telephone calls relating to his personal ministry (Tr. 259).

15. Since 1970, Mr. Bixler has been the President, Chief Executive Officer and Chairman of the Board of Western Pennsylvania. In these positions, he is responsible for overall supervision of station operation, including oversight of the General Manager (Signal Ex. 3, p. 2). He is also responsible for supervision of public relations — all dealings with the public and press — and of the WPCB-TV ministries, including supervision of that station's counselling coordinators, counselling coordinator assistants and the staff who counsel callers. He is a salaried employee of Western Pennsylvania and devotes at least 40 hours per week to these duties. (Tr. 218, 240).

16. At present, Mr. Bixler is involved in a variety of other activities as well. He is a host of various WPCB-TV programs, including one entitled "Getting Together." Since 1976 he has acted as host of this program. Since 1979, he has appeared on "Getting Together" 5 days a week, devoting a minimum of 12.5 hours per week (air time plus preparation time). (Signal Ex. 3, p. 2; Tr. 222, 251-253). This show is aired Monday, Tuesday and Wednesday evenings and Thursday and Friday afternoons (Tr. 250-52). Mr. Bixler also has a personal ministry and devotes time to "telephone calls on personal ministry to people, speaking in churches" (Tr. 243). This activity takes place mostly on weekends, including Friday evenings (Tr. 243, 246). Most of his personal ministry activities are in the Greensburg area (Tr. 244-45). Mr. Bixler has also been a guest on numerous syndicated programs

and programs aired by individual stations across the United States since 1970 (Signal, Ex. 3, p. 2). Further, Mr. Bixler devotes 4-5 hours per month to the Interfaith Ministry (Tr. 221). Finally, Mr. Bixler is Chairman of the National Religious Broadcasters Television Committee and a Director of the National Religious Broadcasters. The latter position requires one week per year of his time (Tr. 231-232).

17. In order to accommodate his part-time commitment to the Burlington facility, Mr. Bixler proposes to reduce to some degree the hours spent in his various positions at Western Pennsylvania (Tr. 256). He specifically stated, however, that it would be incorrect to say that he could reduce his time at Greensburg to 20 hours per week, simply asserting instead that he would commit 20 hours per week during normal business hours to Burlington (Tr. 256). Moreover, he was unable to indicate how his time would be split between the Greensburg and Burlington facilities. Despite specific questioning from the Presiding Officer, Mr. Bixler was unable to indicate more than that he would be travelling to Burlington at least once a week; that he would spend "a block of time in each area in all probability," and that "a portion of it will be daytime. There will be evening. Some weekends I will be spending in Burlington and in the area." (Tr. 226-27).

18. Mr. Bixler will continue to devote at least 20 hours per week to his responsibilities as President; Chief Executive Officer and Chairman of the Board of Western Pennsylvania (Signal Ex. 3, p. 1). This will include his responsibilities dealing with correspondence, which presently take one hour per day and his responsibilities in working with the volunteers, the telephone counselors and the counseling coordinator (Tr. 254).

19. In addition, Mr. Bixler will continue all of his additional activities. He will continue to host two to three programs per week (Tr. 251). He has made no decision as to which of the program hours he will give up (Tr. 252). He intends to continue his personal ministry, although he will expect it to be split 50/50 between Pittsburgh and Burlington (Tr. 244-245). He will also continue to devote "sporadic" time to appearances as a guest on syndicated programs in other parts of the country (Tr. 222). He will continue to devote four to five hours per month as Chairman of Interfaith Ministries Fellowship, Greater Pittsburgh "unless God would tell [him] otherwise." (Tr. 221). Nor does he indicate that he will discontinue his involvement with the National Religious Broadcasters (Tr. 231-232).

20. In addition, Mr. Bixler contemplates additional time commitments in the future, aside from Burlington. As noted above, Western Pennsylvania is the permittee of WKBS(TV), Altoona, Pennsylvania. When the Altoona facility goes on the air, it will operate as a satellite of WPCB-TV. However, some 6 hours per week of programming will originate at Altoona and a decision has been made that Mr. Bixler will appear on these Altoona-originated programs from time to time (Tr. 258).

21. In order to fulfill his commitment to Burlington, Mr. Bixler will have to travel from Greensburg to Burlington "at least once a week." (Tr. 226). The distance between Pittsburgh, where Mr. Bixler intends to maintain a residence, and Burlington, is 300 miles, a six hour drive (Tr. 223-224). Mr. Bixler also indicated that it would be only a one hour plane trip, and claimed that "we've even discussed the possibility of purchasing a private plane" (Tr. 226). However, when asked whether Signal had included the cost of this plane in its cost estimates, Mr. Bixler equivocated, stated instead that "Christians in the Pittsburgh area . . . have at times volunteered their planes . . . at just the cost of fuel" (Tr. 229-230). However, he admitted that Signal had not approached any of these persons to ask whether their planes would in fact be available; that Signal's cost of any such fuel had not been included in the cost estimates; that Signal's principals had only discussed options among themselves; and that Signal would have to obtain a pilot to accompany and assist in any such transportation scheme (Tr. 230-231). In addition, Mr. Bixler indicated that some unspecified time would be required in order to travel to and from the airport if he travelled by plane (TR. 228; 229; 231). Mr. Bixler also admitted that he would have to drive sometimes (Tr. 227). Moreover, Mr. Bixler's planned trips to Altoona will require additional travel time, as Altoona is located at approximately one third of the distance from Greensburg to Burlington (Tr. 259).

David F. Kelton

22. Mr. Kelton proposed to be integrated full-time, at least 40 hours per week, in the position of General Manager of the Burlington facility if Signal's application is granted. As General Manager, he will be responsible for overall management of station operations (Signal Ex. 4, p. 1). Mr. Kelton lives in Greensburg, Pennsylvania (Signal Ex. 8, p. 1, Ex. 4, p. 1). If Signal is awarded the construction permit, Mr. Kelton will move to Burlington (Signal Ex. 4, p. 1).

23. Since 1981, Mr. Kelton has been employed as General Manager and Executive Vice President of WPCB-TV (*Id.* at 3). He also serves as a member of the Executive Committee and Board of Western Pennsylvania (*Id.* at 1, 3).

24. The meetings of Western Pennsylvania's Board take place in Greensburg, once a month for approximately five hours. Western Pennsylvania's executive committee meetings also take place in Greensburg, two to three times a month for a half hour to an hour (Tr. 267). Mr. Kelton is a Speaker for the Full Gospel Business Men's Fellowship International (FGBMFI). This activity, which takes approximately 30 hours per month, will continue if Signal's application is granted (Signal Ex. 4, p. 2).

25. From 1973 to 1976, Mr. Kelton worked for the PTL Television Network, Charlotte, North Carolina, in capacities such as camera operator and stagehand, propmaster and production manager (Signal Ex. 4, p. 2). From 1976 to 1977, Mr. Kelton was general manager of WJAN-TV, Canton, Ohio (*Id.*). Mr. Kelton was director of television operations for PTL from 1977-1980 and was director of research and development for the network in 1980 (*Id.* at 3).

Abraham E. Fenton

26. Mr. Fenton, a Black male, is proposed to be integrated full-time, at least 40 hours per week, as Signal's Director of Programming. In that position, he would oversee and implement station programming policies (Signal Ex. 5, pp. 2-3).

27. Mr. Fenton currently spends 6-8 hours a week, primarily on Tuesday nights, as elder of New Covenant Church, Philadelphia (Tr. 229, 301-302). He also spends approximately 20 hours a week during normal working hours working for Trinity Fellowship Church, Willingboro, or approximately 4 hours per day, plus time on Saturday and Sunday (Tr. 301-302, 306). By the time Signal commences broadcast oeprations, Mr. Fenton will have reduced his commitments to New Covenant Church and Trinity Fellowship Church to 20-25 hours per week (Signal Ex. 5, p. 1-2). Mr. Fenton's work schedule at New Covenant Church and Trinity Fellowship Church is flexible, with no set hours (Tr. 302-303). Mr. Fenton's compensation from New Covenant Church and Trinity Fellowship Church is not tied to the amount of time he devotes to his duties (Tr. 299-300). With respect to Trinity Fellowship Church, Mr. Fenton is not the only elder and does not have to be available; he has chosen to be available (Tr. 306). Mr. Fenton sees

no problem with his availability to Signal 40 hours per week because Trinity Fellowship Church is currently training leaders to take care of the various departments and activities (Tr. 302). Mr. Fenton lives within 3 miles of the City of Burlington (Signal Ex. 5 p. 1).

28. During the period of 1976 to present, Mr. Fenton has been a speaker at numerous churches, clubs and schools in the Willingboro, Burlington and Philadelphia areas. During the period of 1979–81, Mr. Fenton was cofounder of Residents for a Better Willingboro, an organization dedicated to promote better relations between members of the community (Signal Ex. 5, p. 2).

Dorothy J. Harris

29. Ms. Harris is a Black female, is proposed to serve as Assistant General Manager and Director of Personnel of Signal's proposed station, serving in those capacities full time. In Signal's direct testimony it was claimed that as Director of Personnel, she would be responsible for hiring decisions and making recommendations on firing decisions to the Executive Committee, and would develop pesonnel policies and procedures[3] (Signal Ex. 6, p. 4). However, at hearing Mr. Harris indicated that she will be responsible for interviewing prospective staff members, but that there has been no discussion as to who will make the ultimate decisions regarding hiring of, for example, programming staff (Tr. 316–17; 320). Similarly, she indicated that there has been "no discussion" as to who will be responsible for hiring those persons working under Mr. Bixler in the areas of ministry and public relations (Tr. 318, 320). Nor has there been any discussion regarding who will hire those persons working under Mr. Kelton (Tr. 319). In any case, after an interview Ms. Harris would discuss the interview with the general manager "and if necessary, other members of the Board" (Tr. 316). With regard to firing, Ms. Harris indicated only that she would make recommendations but that the decision whether to fire individuals will be made by the Executive Committee (Tr. 320–321). Ms. Harris testified that as assistant general manager she will not have specific duties, but will do whatever is delegated to her by the General Manager (Tr. 322). Ms. Harris will also be a member of Signal's Executive

[3] Ms. Harris indicated that by the term "development of personnel policies and decisions" she meant simply that she would develop policies as to, "for example, how many sick days a person could acquire in the course of a year." (Tr. 321).

Board (Signal Ex. 6, p. 4).

30. Ms. Harris has resided in Signal's proposed service area for approximately 22 years. From 1962 to 1973, she resided in Philadelphia, Pennsylvania. From 1973 to 1979, she resided in Secane, Pennsylvania. From 1979 to the present, she has resided in Brookhaven, Pennsylvania. If Signal's application is granted, she proposes to move to Burlington (Signal Ex. 6, p. 1).

31. Ms. Harris claims the following civic experience:

1965–1973	Organized first Block Community in her neighborhood in Southwest Philadelphia; she was a representative from this community group to the City of Philadelphia.
1973–Present	Active in organizing youth groups within the community and also within local churches, approximately 6 hours per month.
1972–Present	Volunteer at American Red Cross, Philadelphia and Delaware County area. Encouraging members of the public to become blood donors. Volunteered clerical assistance. Also has been available for crises and emergencies to assist the Red Cross with whatever assistance was needed on an on-call basis, approximately 5 hours.
1972–Present	United Way Campaign, Philadelphia and Delaware County, Pennsylvania area. Volunteered clerical assistance. In addition, assisted in coordinating and gathering information and referrals for the various United Way agencies. Approximately 10 hours per week.
1972–1976	Door-to-door volunteer in the March of Dimes Campaign, Philadelphia and Delaware County area.
1980–Present	Vice President and Board Member, Philadelphia area Women's AGLOW Fellowship, Chester, Pennsylvania (4 hours per month). Christian Women's Group.
1979–Present	Volunteer in project to promote unity between the Spanish and Black youth populations of Delaware County, Pennsylvania.
1980 August 1984	Volunteer Staff Member and Member of the Advisory Board, County Owned Services to the Aging, Delaware County, Pennsylvania. Helped to plan and evaluate which services were necessary and effective for senior citizens and helped to choose service providers for senior citizens.
August 1980–Present	Conducting parent-effectiveness training for Community groups and churches upon request on a volunteer basis. Approximately 80–100 hours per year.
1979–Present	Board Member, Chester, Pennsylvania Art Guild. Approximately 4 hours per month.
August 1984–Present	Volunteer Worker, Haverford State Hospital, Haverford, Pennsylvania. Approximately 4 hours per month.

Brunson Communications, Inc.

32. BCI is a New York corporation of which Ms. Brunson is President, Director and sole stockholder. Her brother, Clyde Porter, is Vice President and a Director of BCI and her mother, Naomi Campor, is the Secretary/Treasurer and a Director of BCI. Mr. Porter and Mrs. Campor hold the same positions in each of the corporations listed below (BCI Ex. 1).

Diversification

33. BCI is the sole stockholder of both Brunson Broadcasting Co. of Maryland, Inc., licensee of WEBB(AM), Baltimore, Maryland, and Brunson Broadcasting Co. of Georgia, Inc., licensee of WIGO(AM), Atlanta, Georgia. *Id.* Mr. Brunson is the President and sole shareholder of Brunson Broadcasting Co. of North Carolina, Inc., licensee of WBMS(AM), Wilmington, North Carolina (*Id.*).

34. Prior to the "B" cut-off date in this proceeding, Ms. Brunson, Mrs. Campor and Mr. Porter committed to divest themselves of all ownership and management interests in WEBB, WBMS, and any other broadcast facilities they might acquire during the pendency of the BCI application (*Id.*).

35. Shortly after acquiring Station WEBB(AM), Brunson Broadcasting Co. of Maryland, Inc. filed an application to modify WEBB's facilities. Along with the application, Brunson filed a "Petition for Waiver of Rules" with the Commission on April 2, 1980 (Adelphi Ex. 11). The Petition requested that the Commission waive Section 73.37(e)(2) of its rules which requires that an application for change of facilities from daytime-only to unlimited time contain a showing that the proposed facilities will either serve 25% "white area" or constitute a first or second nighttime aural transmission service to the community specified in the application. Instead, Brunson urged that the rule should be waived because Brunson's proposed facilities would be the first Black-owned, Black-programmed nighttime transmission service to the City of Baltimore — a city of 847,000 people, 59% of whom are Black (Adelphi Ex. 11, p.4).

36. By Memorandum Opinion and Order, 50 RR 2d 941 (BB 1981), the Commission acted on Brunson's waiver request (Adelphi Ex. 12). The Commission granted Brunson's request for waiver of Section 73.37(e)(2) based on Brunson's assertion that "WEBB would be Baltimore's first unlimited-time radio station that is both black-owned and programmed to serve the specialized

needs of the area's black community." (50 RR 2d at 942; Adelphi Ex. 12, p. 2). Furthermore, the Commission waived the coverage requirements contained in Section 73.24(j) of the rules based on the fact that WEBB was a minority-owned station (*Id.*)

37. WEBB completed the construction of its 5000 watt daytime operation in August 1984. The nighttime facilities have not yet been constructed because of various zoning problems encountered with respect to the nighttime site (Tr. 882; 1844-46, 1932-33, 1941). WEBB has a black format (Tr. 1846).

38. In connection with the financing of BCI's acquisition of WEBB(AM), the First Small Business Investment Company of California (FSBIC)[4] holds two convertible debentures that permit it to acquire up to 49 of the 100 authorized shares of BCI (Tr. 821, 863). Both debentures were signed on November 20, 1979 (BCT Ex. 7; Tr. 863).[5] These debentures represent a debt of $400,000 (BCT Ex. 7, pp. 7-14; Tr. 863-64).[6]

39. Security Pacific Capital Corporation, a subsidiary of Security Pacific Bank, is a 6.33% limited partner in WBC Associates, L.P., 90% owner of the parent corporation of WBC Broadcasting Corporation, licensee of Station WWHT-TV, Newark, New Jersey (BCT Exs. 18, 19 and 20). WBC Broadcasting Corporation holds a construction permit to improve the facilities of Station WWHT(TV). The predicted Grade B contour of the improved WWHT(TV) facility will overlap with the predicted Grade B contour of Brunson's proposed facility on Channel 48 at Burlington (BCT EX. 20).

40. The June, 1984 issue of Essence magazine contained an article about black female millionaires, and included several paragraphs about Ms. Brunson.[7] According to this article, Ms. Brunson's future plans include buying two more radio stations and a commercial television station, and beginning to build a cable television system, and she would like to be the "black RCA of America" (Tr. 847). Lloyd Gite, the author of the article, testified that Ms. Brunson had made those statements to him during a telephone interview, with the exception of the statement

[4] FSBIC is a subsidiary of Security Pacific National Bank.

[5] One of the debentures was originally issued to BanCap Corporation (BanCap). However, on September 28, 1981, BanCap assigned all of its rights in the debenture to FSBIC (Tr. 821, 863-64).

[6] FSBIC also holds the $450,000 non-convertible debenture related to the purchase of WIGO (Tr. 863).

[7] The interview with Ms. Brunson took place on December 13, 1983, prior to BCI's filing of the Burlington application and the acquisition of WBMS in Wilmington, North Carolina (BCI Ex. 1).

concerning acquisition of a television station,[8] which he thought had been inserted by Essence based on a subsequent telephone call with Ms. Brunson (Tr. 1670–75). Ms.Brunson denied that she told Mr. Gite that she specifically planned to acquire broadcast and cable facilities (but believed she might have told him hypothetically that having additional communications properties was a dream of hers), and testified that her allusion to RCA related to her admiration for that company's leadership role in broadcast technology, and did not stem from any desire on her part to create a communications empire comparable to RCA (Tr. 913–918). She further testified that she has no present plans "to buy two more radio stations and a commercial television station" (Tr. 917).

Integration

41. Ms. Brunson, a Black woman, proposes to move to Burlington and work full-time, at least forty hours per week, as the General Manager of Channel 48. As General Manager, Ms. Brunson will exercise overall responsibility for the day-to-day operation of the station, including decisions involving broadcast standards and personnel matters. In addition, she will supervise the heads of the various station departments (BCI Ex. 2, p. 1). Ms. Brunson has never lived in Burlington or in the Philadelphia area (Tr. 854–5).

42. Ms. Brunson has had extensive broadcast experience (BCI Ex. 2, p. 1). In 1973 she joined Inner City Broadcasting Corporation as General Manager of WLIB(AM) in New York City. She was later promoted to Vice President of WLIB and in 1977 she was chosen by the Board of Directors adds to be Corporate General Manager and Vice President (BCI Ex. 2, p. 1).

43. Ms. Brunson established Brunson Communications, Inc. in 1979. Since that time she has acquired three AM radio stations; WEBB, Baltimore, Maryland in 1979; WIGO, Atlanta, Georgia in 1981; and WBMS, Wilmington, North Carolina, in 1984. *Id.* She is actively involved in the management of all three stations. Since she resides in Baltimore, she has day-to-day personal involvement in the management of WEBB (*Id.*).

44. The parties do not question Ms. Brunson's representations concerning her broadcast experience with WLIB(AM) or her management of the stations she has acquired since establishing

[8] Under cross examination, Mr. Gite also admitted that he could not remember whether Ms. Brunson said "buy" or "acquire" and that he would have to go by his notes (Tr. 1696–67). His note said "acquire."

Brunson Communications, Inc. in 1979. However, they seek to discredit Ms. Brunson's description of her duties at WWRL(AM) where she worked from 1964–1968.

45. Ms. Brunson testified she started working at WWRL(AM) in New York City shortly after it was acquired by Sonderling Broadcasting (Tr. 1849–50).[9] She states that she began as an Assistant to the comptroller/bookkeeper, Jean Manookian (Tr. 791, 1809). Further, when Ms. Manookian left the station, she was asked to take over her responsibilities (Tr. 1810–11, 1858–59). She retained those responsibilities until she left WWRL (Tr. 1936–37). In addition to her bookkeeping duties, she assisted the station's general manager by performing some personnel and administrative duties (Tr. 1810–11, 1823–24, 1910). She also states that she signed checks, reviewed financial data from other Sonderling stations, kept track of governmental filing dates and payroll tax deadlines and performed other duties (Tr. 805–06, 814, 1832).

46. Egmont Sonderling's and Frank Ward's[10] recollections of Ms. Brunson's duties at WWRL differ from Ms. Brunson's recollection. Mr. Sonderling was President of Sonderling Broadcasting Company while it was privately owned and later President, Chairman of the Board and Chief Executive Officer of Sonderling Broadcasting Corp. when it became a public company sometime around March 1967. Sonderling Broadcasting Company took over the operation of WWRL in January 1964 (Tr. 2019). Frank Ward was the General Manager of WWRL under Sonderling from January 1964 until 1968. In January 1965, he was also named Executive Vice President of WWRL, Inc. (Tr. 1712, 1761).

47. According to Mr. Sonderling and Mr. Ward, Ms. Brunson was never head bookkeeper or comptroller nor did she have any position of any responsibility at the station. She was never offered the position of comptroller or head bookkeeper, and she never had a formal title (Tr. 1716, 1763). They further testified that Ms. Brunson was never named Assistant to the General Manager or Assistant General Manager (Tr. 1717, 1765–66, 1768–69). According to Messrs. Sonderling and Ward, Ms. Brunson never had responsibilities as a bookkeeper and was never more than a clerical employee at WWRL. She was active in the traffic department during her period of employment and helped

[9] Sonderling Broadcasting Company took over the operation of WWLR in January 1964 (Tr. 2019).

[10] Mr. Sonderling and Mr. Ward were called as witnesses by Adelphi. Mary Ann Ward, Mr. Ward's ex-wife who worked at WWRL from late 1964 to February or March 1968, was also called as a witness by Adelphi.

out at the switchboard as a relief operator (Tr. 1714, 1761-63, 1764, 1775). Both Mr. Sonderling and Mr. Ward stated unequivocally that the two signatories to the station checking account were Mr. Ward and the bookkeeper and that Ms. Brunson had never signed any checks for WWRL (Tr. 1720, 1755-56, 1768).

48. Ms. Ward's testimony differed however, with that of Mr. Sonderling and Mr. Ward in several important respects. For example, Mr. Sonderling denied that he had any contact with Ms. Brunson beyond verbal greetings and denied that he had any meeting with her, as Ms. Brunson claimed (Tr. 1713). According to Ms. Ward, however, Mr. Sonderling *did* discuss financial matters with Ms. Brunson while he was at the station (Tr. 2034-35). Mr. Sonderling also denied Ms. Brunson's claim that she had sent him financial reports (Tr. 1720). Once again, Ms. Ward disagreed with Mr. Sonderling and confirmed that Ms. Brunson had indeed prepared and sent financial reports to Egmont Sonderling (Tr. 2045-46). Additionally, both Messrs. Ward and Sonderling stated that during the period from 1964 to 1968 WWRL had no budget (Tr. 1720-21, 1766). By contrast, Ms. Ward was sure the station had a budget and that her husband, Mr. Sonderling and the bookkeeping department had input in its preparation (Tr. 2047).

49. Ms. Brunson's testimony was further corroborated by the testimony of Howard Sanders, an account executive at WWRL during much of the time Ms. Brunson was at the station (Tr. 1962). Mr. Sanders testified to the following: Ms. Brunson started as an assistance bookkeeper and soon became the bookkeeper, replacing Jean Manookian (Tr. 1962-63). She prepared reports for Egmont Sonderling (Tr. 1964, 1966). She met with Mr. Sonderling during his visits to the station and she would also talk to him on the phone (Tr. 1968-69, 1991). Her duties included supervising other employees (Tr. 1973). Ms. Brunson was one of the signatories on the payroll checks, and he remembered receiving checks with her signature (Tr. 1967-68). Mr. Sanders also confirmed that she was the top assistant to the station's general manager, Frank Ward (Tr. 1974).

50. BCI has introduced contemporaneous documentary evidence which further corroborates Ms. Brunson's testimony. Brunson Exhibit 10[11] is a check drawn on WWRL's account with the First

[11] Brunson Ex. 10 was received by *Order*, FCC 85M-1840, released April 24, 1985. In this connection, because of the contradictory recollection of events which occurred two decades ago, the Presiding Judge has urged the parties to try to locate business records of the station reflecting, among other things, who

National City Bank, dated December 24, 1964 and co-signed by Dorothy Brunson (using her maiden name of Edwards) and Frank Ward. This check demonstrates that Ms. Brunson was truthful in stating that she had the authority to sign checks for the station. It also refutes Mr. Sonderling's and Mr. Ward's assertions that Ms. Brunson did not have check writing authority. This check also supports Ms. Brunson's testimony that she was the bookkeeper at WWRL, despite the Sonderling and Ward claims to the contrary. As noted, *supra*, Mr. Sonderling and Mr. Ward both stated unequivocally that the two signatories to the station checking account were Mr. Ward and the bookkeeper (Tr. 1755-56, 1768).

Burlington 48, Inc.

51. Burlington 48 is a corporation in which one thousand shares have been issued (Burlington 48 Ex. 1, p. 1). The officers and stockholders of Burlington 48 are as follows:

Name	*Office*	*% of Voting Stock*
Julian S. Smith	President	17.0%
Frederick M. Himes	Executive Vice President	8.5%
Robert L. Simmons	Vice President/Sales	8.5%
J. Duncan Smith	Secretary	8.5%
John L. Harrison, Jr.	Operations Manager	24.0%
James R. Smith	General Manager	24.0%
B. Stanley Resnick		8.5%
Chesapeake Television, Inc.		1.0%

(*Id.*). Julian S. Smith will vote the shares of Chesapeake Television, Inc. in Burlington 48 (*Id.* at 2). All the individual shareholders are also directors of Burlington 48 (*Id.*).

Diversification

52. Chesapeake Television, Inc., a shareholder of Burlington 48, is the licensee of Station WBFF-TV, Channel 45, Baltimore, Maryland. Commercial Radio Institute, Inc. (CRI), a 33 percent stockholder of Chesapeake Television, Inc., is the licensee of WPTT-TV, Channel 22, Pittsburgh, Pennsylvania and WTTE-TV, Channel 28, Columbus, Ohio (Burlington 48 Ex. 1, p. 2). Baltimore is approximately 100 miles from Philadelphia and Pittsburgh is 200 to 300 miles from Philadelphia (Tr. 995-996).

53. Julian Smith, Frederick Himes, B. Stanley Resnick and Robert L. Simmons are all shareholders of Chesapeake Television, Inc. In addition, Julian Smith, Robert Simmons, Frederick Himes,

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signed checks and who served as bookkeepers in the period in dispute (Tr. 2067-70). Brunson Ex. 10 is the only piece of contemporary documentary evidence which has been offered.

B. Stanley Resnick and Duncan Smith each own stock in CRI. Together they own a total of 62.33 percent of CRI (Burlington 48 Ex. 1, p. 2; Ex. 7, p. 1).

54. Julian Smith and Frederick Himes are directors, officers and shareholders of Bay Television, Inc., whose application for Channel 38, St. Petersburg, Florida, was granted by the Review Board on September 16, 1983 (Burlington 48 Ex. 4, p. 1; Ex. 7, p. 2). The Commission recently affirmed that decision (FCC 85-58, released February 4, 1985). B. Stanley Resnick is also a shareholder of Bay Television, Inc. (*Id.*). These shareholders own a total of 55.8 percent of Bay Television. CRI owns an additional 39.1 percent of voting stock of Bay Television, Inc. (*Id.*).

55. John L. Harrison owns 100 shares of common stock in Comcast Cablevision of Philadelphia, Inc., which is a general partner in Comcast Cablevision of Philadelphia, Ltd., an applicant for a cable television franchise to serve Philadelphia (Burlington 48 Ex. 2, p. 1-2). Mr. Harrison will divest all his interest in and connection with both Comcast companies if Burlington 48 is awarded the construction permit (*Id.*).

Integration

John L. Harrison

56. Mr. Harrison, a Black, proposes to work at the station on a full-time basis as operations manager (*Id.* at 2). Mr. Harrison testified that his responsibilities will include air operations, programming decisions, scheduling, and the allocation of station personnel (*Id.*). He stated that he will also supervise the traffic and production departments (*Id.*). Mr. Harrison has never worked at a broadcast station (Tr. 978).

57. Mr. Harrison was invited by Julian Smith to join Burlington 48 (Tr. 953). He had not previously known Mr. Smith (Tr. 954). Mr. Harrison has paid $240 for his stock in Burlington 48 (Tr. 958).

58. Since 1969, John Harrison, Jr. has resided in Philadelphia, Pennsylvania within the Grade B contour of Burlington 48's proposed station. From 1957-1963, he was stationed at McGuire Air Force Base in Burlington County, New Jersey. He intends to continue to reside within the Grade B service area of Burlington 48's proposed television station (Burlington 48 Ex. 2, pp. 1 and 3; Tr. 978).

59. Mr. Harrison's involvement to civic activities in the Burlington County area is as follows: Planned Parenthood, S.E. Pa. (January 1982–Present; Board of Directors; Personnel Committee; Nominating Committee); Energy for Employment, a non-profit organization (President, June 1983–June 1984); Community Services Planning Council, (June 1980 to present — Board Member of Information and Referral Implementation Network, 1 1/2 years; Chairperson, Standards and Evaluation Subcommittee, 1 year); United Way, S.E. Pa. (Member, Board of Trustees, January 1982–January 1984); Member of West, Southwest Philadelphia Development Council; S.E. Philadelphia Regional Council on Families (Asst. Chairman); Episcopal Diocese Program Planning Committee; and the Urban League (Burlington 48 Ex. 2, pp. 6–7).

60. Harrison's past civic affiliations include the following: Delaware Valley Merit Employer's Council; Council for Equal Job Opportunity, Philadelphia Chamber of Commerce Upward Mobility Task Force; American Helicopter Society; Boeing Management Association, American Cancer Society; Member, Philadelphia School District Vocational Education Advisory Council & Chairman of the Youth Resources Task Force; Federal Regional Council; Federal Executive Board; and Rotary International (1973–1978) (Burlington 48 Ex. 2, p. 7).

James R. Smith

61. Mr. Smith, a Black male, and a Director and 24% stockholder of Burlington 48, will be the General Manager of the proposed television facility on a full-time basis, devoting at least 40 hours per week to station operations. As General Manager, he will supervise the day-to-day management and operation of the station. He will supervise and coordinate the station's ascertainment efforts and community affairs program and administer the station's programming in response to ascertained community needs and interests. In addition, he will supervise the station's personnel and sales policies as well as the station's budgetary processes. He will also assure adherence to the station's equal employment opportunity program (Burlington 48 Ex. 3, p. 2; Tr. 1012, 1016–18).

62. Mr. Smith was invited by Julian Smith to join Burlington 48 (Tr. 991). He owns Jim Smith Consultant Services, Ltd., a public relations firm (Burlington 48 Ex. 1 at 3). He is also president of Preview Careers, a skills research and placement company, and is president of a majority shareholder of Magic Printing Services, a full-service printing company (*Id.* at 3–4). If

Burlington 48 is awarded the construction permit, Mr. Smith will reduce any time he devotes to these business interests in order to meet his full-time commitment at Channel 48 (*Id.* at 2).

63. For approximately 17 years, Mr. James Smith has hosted and produced television shows in the Delaware Valley area. From 1967 to 1971, he was host and producer of "Black America," aired on Station WKBS-TV, Channel 48, Philadelphia, Pennsylvania every Sunday night in prime time. For the past ten years, he has been guest host on the public affairs program "Delaware Valley Forum" broadcast one week every month on Station WPHL-TV, Channel 17, Philadelphia, Pennsylvania. For the past six years, Mr. Smith hosted and produced "Profile," a prime time show also on Station WPHL-TV, Channel 6, during prime time. In addition, he has served as a Minority Advisor at Channel 17 for the last 3 years and previously as Minority Advisor at Channel 48. If Burlington 48 receives a construction permit, he will terminate the activities he has performed for Channel 17 and Channel 6 to devote his time to Channel 48.

64. Since July 1954, James Smith has resided in the Philadelphia metropolitan area. He has lived in Philadelphia since 1962. Mr. Smith intends to continue to reside within the Grade B service area of Burlington 48's proposed television station (Burlington 48 Ex. 3, pp. 1-2).

65. Mr. Smith's involvement in civic organizations is as follows:

Active member, NAACP for 20-24 years.

Children Service, Inc., Board of Directors, 4 years, 1966-1970. The organization places children from broken homes with families. Children Services, Inc. has a staff of 25-30.

Douglas Golf Club — He was President of Douglas Golf Club, a Black owned golf club in 1970.

Frontiers International, a Black service organization with approximately 3200 members. He was National Public Relations Direjctor in 1979-80 and President of the Philadelphia Chapter in 1980. He has been a member for approximately 15 years.

Delaware Valley Housing Authority, Board of Directors, 1975-76. This organization is dedicated to the improvement of housing in the Philadelphia and Burlington areas. The organization covers a five county area including Burlington County.

Organizer of Tioga Youth Council, Philadelphia, Pennsylvania and Council member from 1969-1982. The purpose of the Council was to improve community relations, prevent gang wars and raise the self esteem of youth in the community.

Philadelphia Public Relations Managers Association, Member, 1969-1973. This is a broad-based association covering the Delaware Valley area.

Board of Directors, Philadelphia Tribune, 1972-73 and 1979-80.

Men Concerned, a Black professional organization. He has been a member since 1968 and served as Vice President in charge of Public Relations during 1980-81.

Public Relations Representative, Freeway Golf Course, Turnersville, New Jersey, an 18-hole championship golf course owned by Blacks, from 1968-1972.

(Burlington 48 Ex. 3, pp. 5-6).

66. James Smith has received the following awards: Freedom Foundation — Thomas Jefferson National Award; Greater Philadelphia Chamber of Commerce — Man of the Month; Tioga Youth Council Citizens Award; Man of the Year — Federation of Negro Women; and the Citizen of the Year — Pennsylvania State Association of Modern Beauticians & Cosmotologists, Inc. (Burlington 48 Ex. 3, pp. 6-7).

B. Stanley Resnick

67. Mr. Resnick, a Director and 8.5% stockholder of Burlington 48, Inc. will be the full-time Business Manager of the proposed television station, devoting at least 40 hours per week to station operations. As Business Manager, he will oversee all financial and accounting matters at the station, including the review of contracts and banking arrangements. He will oversee the bookkeeping department, prepare sales and collection reports and assume responsibility over accounts receivable and payable, cash disbursements and budgeting (Burlington 48 Ex. 4, pp. 1-2).

68. Since 1955, Mr. Resnick has been self-employed as an Attorney-Public Accountant. However, from 1960 to the present his chief responsibility has been his position as Business Manager and Tax Accountant for Chesapeake Television, Inc. and Commercial Radio Institute, Inc. His present responsibilities include finances, management, tax preparation and the supervision of 5 employees. Mr. Resnick has stated that he will modify his present duties to accommodate his 40 hours per week commitment to Burlington 48 (Burlington 48 Ex. 4, pp. 2-3).

69. Mr. Resnick currently resides in Baltimore, Maryland. However, if Burlington 48 receives a construction permit, he intends to purchase a condominium in Burlington where he will reside during the week to fulfill his 40 hour per week commitment to Burlington 48. His present duties as CRI and Chesapeake will

be reduced to a few days a month. The bulk of his present duties will be assumed by the Assistant Business Manager of CRI (Burlington 48 Ex. 4, pp. 1, 3; Tr. 1045; 1047).

70. Except for Mr. Harrison and James Smith, all the directors and individual shareholders of Burlington 48 have had prior business dealings with Julian Smith, president of Burlington 48 (Tr. 1043; Burlington 48 Ex. 7). For example, Frederick M. Himes is both Executive Vice President of Burlington 48 and a shareholder, director and officer in Julian Smith's other two broadcast companies: Chesapeake Television, Inc. and Commercial Radio Institute, Inc. He testified that there have been no instances in which the board of directors took an action that was contrary to the specific vote of Julian Smith (Tr. 1619; Burlington 48 Ex. 7, p. 1). If Julian Smith and the other members of Burlington 48's board of directors with whom he has associated in other business ventures vote together, they will have the say as to the financial funding and sources of funding for the television station (Tr. 1621). They will also have the say as to the management of the company, and the composition of the board of directors and officers (*Id.*).

71. The working capital and other general funding requirements of Burlington 48 will be provided by loans or advances from Chesapeake Television, Inc. or from third parties for which Chesapeake Television, Inc. will act as guarantor or accommodation party if necessary (Adelphi Ex. 13, p. 2). Julian Smith is the president of Chesapeake Television, Inc., and its largest individual shareholder (Burlington 48 Ex. 7, p. 1).

72. Chesapeake Television, Inc. has the right, for a period commencing two years and ending five years from the first commercial broadcast operations of Burlington 48, to purchase up to two-thirds of the shares held by the current stockholders (Adelphi Ex. 13, p. 2; Tr. 996-997). This option in favor of Chesapeake Television, Inc. was "to reward Chesapeake for standing behind the money" it puts into Burlington 48 (Tr. 1625). If Chesapeake Television, Inc. chooses to exercise its right, it will be ultimate controlling owner of the station (Tr. 1625).

Burlington Broadcasters, Ltd.

73. BBL is a limited partnership organized under the laws of the State of New Jersey (BBL Ex. 3). BBL's ownership structure is as follows:

Name	*Nature of Partnership Interest*	*Percent of Ownership*	*Percent of Voting Ownership*
Robert Barnett	General Partner	12.0%	60%
Gordon A. MacInnes	General Partner	8.0%	40%
Gordon A. MacInnes	Limited Partner	35.0%	0%
George E. Bartol, III	Limited Partner	11.25%	0%
Richard and Mary Bush Wolszon	Limited Partner	11.25%	0%
Thomas and Victoria Vallely	Limited Partner	11.25%	0%
John P. Hellstrom	Limited Partner	11.25%	0%

Id.

74. BBL's general partners have full and exclusive power to manage, control, administer and operate the business and affairs of the partnership (BCT Ex. 10, Section 6.1(A)). BBL's limited partners have no role in the management of the partnership (*Id.*, Section 8.1). They are, however, entitled to vote on certain "major decisions" of the partnerships — voluntary withdrawals of general partners, dissolution of the partnership, and ratification of the capital plan that will govern the construction and initial operation of the proposed station (*Id.*, Section 3.2(a), 3.2(d), 9.1, and 10.1).

75. The general partners have contributed $2,000 to the partnership ($1,200 by Mr. Barnett, $800 by Mr. MacInnes) and will contribute an additional $200,000 if BBL's application is granted ($120,000 by Mr. Barnett, $80,000 by Mr. MacInnes) (*Id.*, Section 3.2(a). Mr. MacInnes has also contributed $1,000 as the initial limited partner (*Id.*, Section 3.2(b). BBL's other existing limited partners, who are known as "Class A" limited partners, are contributing $200,000 to the partnership in accordance with a schedule that calls for payment in full by March 30, 1985 (*Id.*, Sections 3.2(b), (c)). Additional contributions may be sought from the Class A limited partners if such contributions are needed to fund the prosecution of the application (*Id.*, Section 3.2(c)). The Class A and initial limited partners are not required in those capacities to contribute any further sums; the general partners and any additional, "Class B" limited partners are responsible for

any post-grant equity financing (*Id.*, Section 3.2(d), (e)).

76. Gordon MacInnes is the moving force behind the BBL application (Tr. 1225, 1226). Mr. MacInnes approached Mr. Barnett and asked him to become part of BBL (Tr. 1187, 1188). Mr. MacInnes testified that one of the reasons the limited partnership structure was adopted was in order to enhance the position of the minority member of the group (Tr. 1230, 1231). Mr. MacInnes was primarily responsible for obtaining the transmitter site for BBL, selecting BBL's attorney and formulating its financial plan (Tr. 1121). Mr. MacInnes paid a law firm to draft the limited partnership agreement (Tr. 1107).

77. Each of BBL's limited partners was brought in as a result of Mr. MacInnes' effort (Tr. 1199). Mr. Bartol, a limited partners, is Mr. MacInnes' father-in-law (Tr. 1194). Victoria Vallely and Mary Ross Wolzson, limited partners, are sisters-in-law of Mr. MacInnes (*Id.*).

Diversification

78. BBL does not have an interest in any medium of mass communications (BBL Ex. 3). Gordon MacInnes owns 200 shares of the common stock of each of two companies with media interests — Multimedia, Inc. and Meredith Corp. These are publicly-held companies, and Mr. MacInnes owns well below 1% of the issued and outstanding stock of each company. Robert Barnett is currently employed in a production-related capacity with the New Jersey Public Broadcasting Authority (NJPBA), and owns and operates a company that provides production service to television stations, program producers, and stage companies; he will terminate both activities if BBL's Channel 48 application is granted (*Id.*). Messrs. Barnett and MacInnes have pledged that they will sever any interests or connections with AM, FM, and TV stations (other than their interests in BBL), if BBL's application is granted (*Id.*).

Integration

79. Mr. Robert Barnett and Mr. Gordon MacInnes both propose to work full-time at the Channel 48 facility. Mr. Barnett would serve as Station Manager and Director of Broadcast Operations, and Mr. MacInnes as Program Director and Chief Financial Officer (BBL Exs. 1-2). Mr. MacInnes will be primarily responsible for the station's programming policies and for its finances (BBL Ex. 2, p. 2). Mr. Barnett will give particular

attention to production engineering and other operations functions (BBL Ex. 1, p. 2).

Gordon MacInnes

80. Mr. MacInnes resides in Morristown, New Jersey (BBL Ex. 2, p. 3). If BBL is awarded the construction permit, Mr. MacInnes intends to move to the Burlington area. *Id.* While a student at Princeton University, Mr. MacInnes lived in Princeton, New Jersey from September 1963 until June 1965 (*Id.*, at 2; Tr. 1207). Mr. MacInnes lived in Trenton, New Jersey from 1965 to September 1966 and July 1967 to March 1970 (BBL Ex. 2, p. 2). Trenton and Princeton are within BBL's proposed service area (*Id.*).

81. Between June 1978 and approximately February 1979, Mr. MacInnes served as a consultant to WNET(TV), Newark, New Jersey, in the area of New Jersey programming (BBL Ex. 2, p. 5). From April 1979 until August 1983, he was executive director of the New Jersey Public Broadcasting Authority, licensee of four non-commercial television stations in New Jersey — WNJS, Camden; WNJM, Montclair; WNJB, New Brunswick; and WNJT, Trenton (BBL Ex. 2, p. 4). As executive director, Mr. MacInnes acted as executive officer of the Authority and as general manager of the stations (*Id.* at 4–5). During the tenure as executive director, Robert Barnett was one of his employees at the Authority (Tr. 1095, 1187).

82. From July 1965 to September 1966, Mr. MacInnes was employed as the Deputy Director of United Progress, Inc., a community action agency in Trenton, New Jersey (BBL Ex. 2, p. 3). From July 1967 to November 1968, Mr. MacInnes served as special assistant to the Commissioner of Education of New Jersey and from November 1968 to March 1970, he served as special assistant to the Governor of New Jersey (*Id.*). From 1970 to 1978, he ran the Fund for New Jersey, a grant-making foundation (*Id.*). In 1971, Mr. MacInnes founded the Coalition for Fair Broadcasting in New Jersey (*Id.* at 4). No evidence was adduced showing that this organization has any members in the service area of the proposed station. He is currently a trustee of the Center for Analysis of Public Issues in Princeton (*Id.*).

Robert Barnett

83. Mr. Barnett, a Black, has resided in Fieldsboro, New Jersey, since April 1982 (BBL Ex. 1, pp. 3–4). Fieldsboro is in Burlington County and is approximately seven miles from

Burlington city limits (*Id.* at 3). While serving in the Air Force, Mr. Barnett lived at McGuire Air Force Base, in Burlington County, from September 1955 to September 1959; in the City of Burlington from July 1968 to December 1968; and in Bordentown, New Jersey (in Burlington County) from December 1968 to April 1982 (*Id.*).

84. Mr. Barnett is currently employed as the lighting director of the New Jersey Public Broadcasting Authority, licensee of four non-commercial television stations — WNJS, Camden, New Jersey; WNJM, Montclair, New Jersey; WNJB, New Brunswick, New Jersey; and WNST, Trenton, New Jersey (BBL Ex. 1, p. 4). He has held that position since 1980 (Tr. 1075). Mr. Barnett has been working for the New Jersey Public Broadcasting Authority on a full-time basis since 1972 (*Id.*). During that time, he has held the positions of rear projection operator, cameraman, floor manager, crew chief and studio supervisor (BBL EX. L, P. 4). Mr. Barnett is an associate producer of a bi-weekly program and is responsible for producing approximately three segments per week (*Id.*).

85. During his residence in the Burlington area, Mr. Barnett has been active in local groups such as the Fieldsboro City Council; NAACP and Masons and Shriners (BBL Ex. 1, pp. 3–4). He has counselled minority student groups in Burlington, Mercer and Middlesex Counties regarding opportunities for minorities in broadcasting and has instituted tutorial programs for black high school students in Burlington County (*Id.* at 4). Mr. Barnett was a mayoral appointee to the Borough Safety Committee in Fieldsboro (*Id.*).

Adelphi Broadcasting Corporation

86. Adelphi Broadcasting Corporation is a New Jersey corporation (Adelphi Ex. 1). Its Certificate of Incorporation authorizes the corporation to issue 2,500 shares without nominal or par value (Brunson Ex. 7). The Certificate of Incorporation did not provide for voting and non-voting stock. Adelphi's By-laws authorize two classes of stock with only Class A stock having voting rights (BCT Ex. 14). The Articles have since been amended to specify two classes of stock (*Memorandum Opinion and Order*, FCC 85M–2277, released May 30, 1985).

87. The officers and directors of Adelphi are set forth in the following table. Also, set forth are the ownership interests of principals at the time of the hearing.

Person	*Office*	*Director*	*% of Voting Stock*	*% of Non-Voting Stock*
Nancy Ginzel	President	Yes	50%	17.5%
Barbara Anderson	Sec./Treas.	Yes	25%	6.25%
Beverly Harper	Vice Pres.	Yes	25%	6.25%
Peggy Filis-Burkhardt	—	—	—	30%
Andrea J. Cetera	—	—	—	30%
Robin Reibel	—	—	—	10%

(Adelphi Ex. 1).

88. 100 shares out of the authorized 2,500 shares of stock had been issued at the time of the hearing. The shareholders of Adelphi held the following beneficial interests:

Person	*No. of Voting Shares*	*No. of Non-Voting Shares*	*Total Shares*	*Beneficial Interest*
Nancy Ginzel	10	14	24	24%
Barbara Anderson	5	5	10	10%
Beverly Harper	5	5	10	10%
Subtotal	20	24	44	44%
Peggy Filis-Burkhardt	—	24	24	24%
Andrea Cetera	—	24	24	24%
Robin Reibel	—	8	8	8%
Subtotal	—	56	56	56%
TOTAL	20	80	100	100%

(BCT Ex. 12; BCT Ex. 11; Tr. 1274-76)

Thus, at the time of the hearing, the voting stockholders held an aggregate 44% beneficial interest in the corporation, and the non-voting stockholders held an aggregate 56% beneficial interest (Tr. 1276).

89. The voting and non-voting stock both cost $150 a share (Tr. 1320). While Adelphi's principals maintained that no more voting stock would be issued, the non-voting stock can increase to as many as 2480 shares (Tr. 1277, 1323-24). In the event of sale or dissolution, the distribution of Adelphi's shares would be according to the beneficial ownership of both voting and non-voting stock at the time (Tr. 1323-24). If Adelphi is dissolved, the holders of the voting stock would not necessarily receive the beneficial interest they currently hold. Rather, the percentage would diminish as a result of the issuance of additional stock (Tr. 1324-25). At the time that Adelphi's principals testified, in late October 1984, they indicated that there had been an additional capital call, but a decision was reached that the additional stock would not be issued until the end of 1984. When the additional

stock is issued as a result of this capital call, the voting stock will represent less than 20% of the total beneficial interest in the corporation (Tr. 1443-44). At the time of hearing, non-voting stockholders Andrea Cetera and Peggy Filis-Burkhardt had put in substantial portions of their share of the additional call; voting stockholder Nancy Ginzel had put in about 70% of her share; and voting stockholder Beverly Harper had not put in any portion of her share (Tr. 1391-92).

90. On April 8, 1985, Adelphi amended its application to report the issuance of an additional 388.67 shares of non-voting stock to its shareholders. As a result of this stock issuance, beneficial ownership in Adelphi is held as follows:

Person	*No. of Voting Shares*	*No. of Non-Voting Shares*	*Total Shares*	*Beneficial Interest*
Nancy Ginzel	10	114.00	124.00	25.41%
Barbara Anderson	5	11.67	16.67	3.41%
Beverly Harper	5	18.33	23.33	4.78%
Subtotal	20	144.00	165.00	33.60%
Pegyy-Filis Burkhardt	—	124.00	124.00	25.42%
Andrea Cetera	—	124.00	124.00	25.42%
Robin Reibel	—	74.67	74.67	15.31%
Subtotal	—	322.67	322.67	66.15%
TOTAL	20	487.67	487.67	99.75%

The aggregate beneficial interests of the voting stockholders has decreased from 44% to 33.60% and the aggregate beneficial interest of the non-voting stockholders has increased from 56% to 66.15% (Memorandum Opinion and Order, FCC 85M-2276, released May 30, 1985).

91. The Adelphi shareholders conceded that its voting-nonvoting dichotomy was an attempt to benefit from the Commission's policies favoring minority ownership (Tr. 1263, 1299, 1429, 1545, 1547, 1548). Ms. Harper testified that:

> In trying to be consistent with the FCC in making this, if you will, almost false distinction between those who vote and those who don't, that we were forced into — we were almost forced into setting up this way of operating. But we are a group of six people who have a lot of respect for one another's opinions and we wanted to make our application the strongest possible application and so we did what we thought was necessary to do that.

(Tr. 1291, 1292).

92. The three voting stockholders and directors of Adelphi are Black, whereas the three non-voting stockholders and non-directors are white (Tr. 1429, 1545; 1548). Despite the fact that

the company is divided into voting and non-voting stockholders, all of Adelphi's principals will work at the proposed facility — the non-voting stockholders along with the voting shareholders (Adelphi Ex. 2).

93. Peggy Filis-Burkhardt and Andrea Cetera, both non-voting stockholders, took on the responsibilities of forming Adelphi (Tr. 1529-30). Peggy Filis-Burkhardt examined the market, its viability, and the existing competitive environment and evaluated what it would take to put the station on the air (Tr. 1574-75). Her home is the registered address for the corporation and the address of the applicant given the FCC (Tr. 1569). She also admitted that there's no question that she has had the most contact with Adelphi's FCC counsel on an ongoing basis (Tr. 1585).

94. Adelphi's principals admitted that the corporation has been operating in a very collegial manner (Tr. 1285). In the deliberations about the application process, non-voting members of the group participated (Tr. 1290, 1319, 1333). In fact, at all meetings of Adelphi, all six stockholders have been invited, and all those who attended participated in the discussions (Tr. 1294). All stockholders, both voting and non-voting, have been involved in every discussion of substance (Tr. 1560, 1569). With regard to the call for additional funds in the fall of 1984, no official vote of the directors was taken; instead, an agreement was reached among all the stockholders (Tr. 1391, 1442-43). All six stockholders empowered Adelphi's FCC counsel to secure a bank loan[12] and an equipment credit letter (Tr. 1448-49). At all meetings of Adelphi stockholders where votes have been taken, non-voting members of the group were present during the vote (Tr. 1381).

95. Prior to the hearing, the stockholders of Adelphi had held five meetings at which minutes were taken: October 5, 1983; December 19, 1983; February 27, 1984; June 11, 1984 and July 15, 1984 (Tr. 1374-75). The October 5, 1983 meeting was held in New York City at Andrea Cetera's apartment. The minutes were signed by Peggy Filis-Burkhardt on behalf of Barbara Anderson. All six stockholders participated in the discussions (Tr. 1375-76).

96. The December 19, 1983 meeting was held at the New York office of Adelphi's FCC counsel. Voting shareholders Barbara Anderson and Beverly Harper were absent from this meeting at which the shareholders discussed the number of shares each would get (Tr. 1329, 1376-77). At the hearing, Beverly Harper testified that she didn't know who decided each share of stock

[12] There is no collateral requirement in Adelphi's bank letter (Tr. 1400-01).

would cost $150 (Tr. 1331). Peggy Filis-Burkhardt signed the minutes of the December 19, 1983 meeting on behalf of Barbara Anderson (Tr. 1376-77).

97. Beverly Harper's office in Philadelphia was the site of the February 27, 1984 meeting. Barbara Anderson was absent and Beverly Harper signed the minutes on her behalf. Everyone participated in the discussions (Tr. 1377-78). The June 11, 1984 meeting was held in New York City at Andrea Cetera's home. Robin Reibel and Barbara Anderson were absent. Andrea Cetera signed the minutes on behalf of Barbara Anderson. All persons present participated in the discussions and agreed (Tr. 1378-82). At the July 15, 1984 meeting, all stockholders were present, and Barbara Anderson signed the minutes. Everyone participated in the discussions (Tr. 1382).

Diversification

98. Neither Adelphi or any of its shareholders, officers, or directors has any ownership of any kind in any mass media. Beverly Harper is on the Board of Directors of Comcast of Philadelphia, Inc., and owns 100 shares of stock (less than one percent). The company is competing for a cable franchise in Philadelphia. She has advised Comcast that if Adelphi gets the grant and Comcast gets the franchise, she will resign from the board of Comcast and divest her stock.[13] Nancy Ginzel is an employee of the ABC network, and Peggy Filis-Burkhardt is employed by WCBS-TV. Neither is an officer or director or one percent or greater shareholder, and both have committed to terminate their positions. Ginzel's husband is employed by Turner Broadcasting, but is neither an officer, director nor management level employee, nor holds an attributable ownership interest in the company. Andrea J. Cetera until recently was employed by Viacom Enterprises, whose subsidiary Viacom Broadcasting, has an interest in four television stations and eight radio stations. Andrea J. Cetera is neither an officer nor director of Viacom Broadcasting, and has no attributable stock ownership in the company. She made a commitment to terminate her employment with Viacom Enterprises before Adelphi commences operations

[13] On July 25, 1985, Adelphia amended its application to report that on June 27, 1985, the city council of Philadelphia approved a contract for cable service to be provided by Comcast Cablevision of Philadelphia. The amendment further recites that on July 22, 1985, Ms. Harper submitted her resignation to Comcast as a member of the Board of Directors and that she has also sold her 100 shares of Comcast stock (*Order*, FCC 85M-3605, released September 16, 1985).

(Adelphi Ex. 3; Tr. 192, 1346, 1359).

Integration

99. Adelphi proposes to integrate its three minority voting stockholders, Nancy Ginzel, Barbara Anderson and Beverly Harper. The non-voting stockholders will also be working at the station on a full-time basis and in establishing staff positions, Adelphi did not differentiate between minorities and non-minorities (Tr. 1421).

100. Adelphi's staff positions are structured as follows:

Person	*Position*
Nancy Ginzel	General Manager
Peggy Filis-Burkhardt	Station Manager
Andrea Cetera	Program Director
Beverly Harper	Community Affairs Director
Barbara Anderson	Human Resources Director
Robin Reibel	Marketing Director

(BCT Ex. 13).

101. Adelphi's own organizational chart reflects that the traffic, business affairs, facilities management and engineering departments will all report to the Station Manager, Peggy Filis-Burkhardt (BCT Ex. 15). The production and talent departments will report to the Program Director, Andrea Cetera. *Id.* She will also manage the studio crews, purchase films and work with the Research Director, the Sales Manager and the Program Schematics Manager (Tr. 1411-14). The Community Affairs Director and Human Resources Director will not be supervising any other departments (BCT Ex. 15).

Nancy Ginzel

102. Ms. Ginzel intends to be General Manager of the proposed Burlington station and expects to work on a full-time basis, at least 40 hours or more per week. Ms. Ginzel will participate in industry and community activities and will represent the station in industry-wide meetings and trade shows. Adelphi claims that Ms. Ginzel will have supervisory and managerial responsibility over all station personnel and policy (Adelphi Ex. 4, p. 2). However, non-voting stockholder Peggy Filis-Burkhardt will be the full-time Station Manager of the proposed Burlington station, and the traffic, business, engineering and facilities maintenance departments will all report to her (Adelphi Ex. 8, p. 2; Tr. 1587, 1465-66).

103. From 1968 to 1970, Nancy Ginzel was employed as a Broadcast Buyer and Research Analyst for the advertising agency of J. Walter Thompson in New York. She was a Broadcast Buyer for another agency, Ogilvy and Mather, New York, from 1970 to 1971. In 1971 and 1972, Ms. Ginzel worked at Station WPIX(TV), New York, New York as an Account Executive and then, from 1972 to 1974, as an Account Executive for WABC(TV), New York. From 1974 to 1978, Ms. Ginzel worked at WFSB(TV), Hartford, Connecticut, first as Local Sales Manager, then National Sales Manager and finally General Sales Manager. Since 1978 she has been employed by the ABC Network as Prime Time Network Sales Executive (Adelphi Ex. 4, pp. 1-2).

104. Ms. Ginzel currently resides in New York City but stated that she intends to relocate to the Burlington area within the service center contour of Adelphi's proposed station (Adelphi Ex. 4, p. 1). Her husband is not necessarily planning to move to Burlington with her (Tr. 1370).

Barbara Anderson

105. Ms. Anderson, a Black woman, proposes to work full-time, forty (40) hours per week at the proposed station as Human Resources Director. She will be in charge of all labor relations, including negotiation of union contracts, administering and settling any labor disputes, including wages and salary administration, job evaluation, counselling, employee services and benefits and EEO (Adelphi Ex. 2, p. 1).

106. Although Barbara Anderson is Adelphi's Treasurer, she is not authorized to sign checks on behalf of Adelphi. All checks are signed by Adelphi's FCC counsel (Tr. 1510). Ms. Anderson doesn't know the name of the Washington, D.C. bank at which Adelphi's checking account is kept, and she has never seen the bank statements (Tr. 1511). Any bills to Adelphi go first to Peggy Filis-Burkhardt who then forwards them to Ms. Anderson. The bills are paid by communications counsel (Tr. 1512).

107. Ms. Anderson currently resides in Trenton, New Jersey where she has lived for the past 18 years. Trenton is within the service contour of Adelphi's proposed television station and is located approximately 12 miles from Burlington (Adelphi Ex. 5, p. 1). Ms. Anderson is a consultant to the Sex Desegregation Institute at Rutgers University and the former Race Desegregation Institute at Rider College. Through "Alpha Kappa Alpha," a Black Sorority, Ms. Anderson has been involved in voter registra-

tion in the Trenton/Burlington area for the past five years. For three years, she chaired the Alpha Kappa Alpha Martin Luther King Breakfast, a community service project which she initiated. From 1980 to 1982, Ms. Anderson was Executive Director of the New Jersey Black Political Education Coalition, a statewide group (Adelphi Ex. 5, pp. 4–5).

Beverly Harper

108. Ms. Harper, a Black woman, intends to be Community Affairs Director of the proposed Burlington station and expects to work on a full-time basis, at least 40 hours per week. She will have day-to-day responsibility for station license obligations and related programs. She will supervise the station's ascertainment and will be in charge of the development and production of public service announcements, as well as all public service projects for the station (Adelphi Ex. 6, p. 3). Although Ms. Harper stated that she will supervise on-air talent for public service programs, Adelphi's organizational chart reflects that talent will report directly to the Program Director, *i.e.*, Andrea Cetera — a non-voting stockholder (Adelphi Ex. 6, p. 3; BCT Ex. 15). Ms. Harper has no broadcast experience (Tr. 1284). She indicated that she would rely on the broadcast experience of Peggy Filis-Burkhardt, Andrea Cetera and Robin Reibel in the management of the station (Tr. 1337).

109. Beverly Harper currently resides and works in Philadelphia, Pennsylvania, within the service contour of Adelphi's proposed station (Adelphi Ex. 6, p. 1). Ms. Harper intends to terminate her employment so that she may work full-time at the proposed station but intends to continue her community and civic activities to the extent they do not interfere with her commitment to Adelphi (Adelphi Ex. 6, p. 4). Ms. Harper is President of the Brain Trust, a minority business action group designed to enhance the business opportunities for minorities and women in the Delaware Valley. She is a member of the Board of the Pennsylvania Coalition of 100 Black Women, the Founder and Executive Director of the Arts Management Corporation, a member of the Mayor's Economic Roundtable of the City of Philadelphia, a member of the National Association of Media Women, and a Board Member of the Urban Affairs Partnership. In the past, Ms. Harper has served on the Board of Trustees of the United Fund of Greater Philadelphia, the Board of Directors of the Junior Achievement of Delaware Valley, the College Advisory Committee for the Philadelphia Community College, and

the Board of Managers for the Economic Development Fund of the Friends Yearly Meeting. She has also served as a Member of the Individual and Community Services Review Committee of the United Fund of Greater Philadelphia. For approximately five years between 1975 and 1980, Ms. Harper was a Commissioner at the Pennsylvania Commission for Women. She is currently a Board Member of the Philadelphia Dance Company (Adelphi Ex. 6, p. 2).

CONCLUSIONS

BBL Ownership Issue

110. BBL's application provided information concerning only the holders of 68.5% of its equity. The Mass Media Bureau designated issues to explore who owned the remainder of BBL's equity and to examine BBL's compliance with Section 73.3514(a). BBL subsequently admitted a 4.5% limited partner and allocated the remaining 27% of its reserved equity on a *pro rata* basis to its Class A limited partners. BBL, therefore, has identified all of its partners, and no questions remain concerning the identity of those partners. Further, BBL did not conceal the identity of persons holding 31.5% of its equity. On the contrary, BBL promptly amended its application as ownership changes occurred. The findings establish that BBL has acted in good faith throughout this proceeding. Neither disqualification or a comparative demerit is warranted.[14] Accordingly, the Section 73.3514(a) issue is resolved in BBL's favor.

Standard Comparative Issue

Diversification

111. Adelphi has no cognizable media interests. Several of the applicants urge that Adelphi should receive a demerit because of Beverly Harper's interest in Comcast, a company seeking a cable franchise in Philadelphia. The contention is rejected. Adelphi disclosed Ms. Harper's intention to divest her Comcast interest (which has been carried out) in response to interrogatories and at hearing (Tr. 1364, 1359). The disclosure response to interrogatories and at hearing (Tr. 1364, 1359). The disclosure commitment, made long before the city council of Philadelphia approved a

[14] It is noted that character issues including rule violations are now excluded from comparative analysis. *Report, Order and Policy Statement*, FCC 85-648, released January 14, 1986, paragraphs 111-113.

contract for cable service to be provided by Comcast, was timely. The fact that the disclosure commitment was not made prior to the B-cut-off date is irrelevant since Comcast was then only an applicant for a cable television franchise in Philadelphia. No diversification demerit is, therefore, warranted.

112. BBL and its principals have no media ownership interests of any significance. Mr. MacInnes' minor holdings in publicly-held company are *de minimis*. Mr. Barnett owns and operates a production company that provides services to television stations, but production companies are irrelevant for diversification purposes. *See Colorado Television, Inc.*, 56 RR 2d 1080, 1086 n.11 (Rev. Bd. 1984). *Golden State Broadcasting Corp.*, 94 FCC 2d 212 (Rev. Bd. 1983); *Morris, Pierce & Pierce*, 88 FCC 2d 713, 723–24 (Rev. Bd. 1981). Moreover, Mr. Barnett stated prior to the B cut-off that he would sever all interests and connections with broadcast stations if BBL's application were granted. Even if Mr. Barnett's ownership interest in his company were to continue, therefore, the company would not provide post-grant services to broadcast stations. Accordingly, Mr. Barnett's company is irrelevant to the diversification analysis.

113. BCI also has no attributable media interests. Prior to the "B" cut-off date, Ms. Brunson and other officers and directors of BCI made an unequivocal commitment to divest themselves of all ownership and management interests in WEBB, WIGO, WBMS and any other broadcast facilities they might acquire during the pendency of this proceeding. The other applicants assert that BCI's divestiture commitment is not credible. The short answer is that it is unnecessary to decide whether the commitment is credible. A grant to BCI will be conditioned on the fulfillment of its divestiture commitment. Failure to fulfill this condition would result in the forefeiture of any construction permit awarded. In addition, BCI's competitors have not demonstrated any frailty in this commitment. It is urged that BCI's divestiture commitment conflicts with Ms. Brunson's declaration of her intention to acquire more stations. The parties rely on one sentence appearing in an article about Ms. Brunson in the June 1984 edition of Essence magazine. The article stated that "Dorothy's future plans included buying two more radio stations and a commercial television station this year and beginning to build a cable television system." This sentence, however, is of no signficance. First, there is not reliable evidence that Ms. Brunson ever made the statement in question. Ms. Brunson specifically denied that she made such a statement in the manner in which it appeared in

the article. Ms. Brunson never saw the article in draft form before it was published and there is no evidence that Essence magazine ever verified the quotations and reported information with Ms. Brunson prior to publication. Even assuming Ms. Brunson told the reporter about specific future plans, that statement is consistent with Ms. Brunson's broadcast ownership on December 13, 1983, the date the interview took place. At that time, Ms. Brunson had not yet filed her application for Channel 48 or had she yet acquired WBMS in Wilmington, North Carolina. Also, she still had an application pending for a new FM radio station in Newark, New Jersey, which she subsequently dismissed. Since her acquisition of WBMS, Ms. Brunson has not entered into any negotiations looking toward the acquisition of any other station (Tr. 921). She has no present plans to do so (Tr. 917). Moreover, the other parties overlook the fact that Ms. Brunson made her divestiture commitment long after the Gite telephone interview. Thus, even if she had intended, prior to the filing of the Burlington application, to acquire other stations, that has no bearing on what her intent has been since she made the divestiture commitment. Thus, the statement from the magazine article cannot be deemed to contradict Ms. Brunson's unequivocal divestiture commitment.

114. Adelphi and Burlington 48 also question the credibility of Ms. Brunson's divestiture commitment in light of her existing indebtedness to FSBIC. The applicants allege that Ms. Brunson cannot effectuate her divestiture proposal unless she can sell her three radio stations and generate sufficient cash to retire BCI's indebtedness to FSBIC and buy out FSBIC's conversion rights, which are valued at 49 percent of the equity value of the stations. Ms. Brunson's divestiture commitment must be credited because there is not one shred of evidence in the record indicating that BCI's will not be able to effectuate its commitment to dispose of its radio stations. No evidence was produced demonstrating that BIC's will not be able to sell its stations at their fair market value, retire its existing indebtedness and extinguish the outstanding conversion rights. Nor does FSBIC's right of first refusal on any additional financing proposal made by BCI's place FSBIC in a position to preclude BIC's from acquiring funding to buy out FSBIC's interests. If BCI's wants to obtain additional financing, it negotiates its best deal with a third party financier. BCI's then presents the terms of that deal to FSBIC, which has the opportunity to match them. If FSBIC is unwilling to do so, BCI's is free to arrange its financing with the other entity. Thus,

FSBIC cannot prevent BCI's from acquiring funding to sell the stations and buy back FSBIC's conversion and purchase rights. Finally, contrary to Burlington 48's assertions, BCI's had no obligation to demonstrate that it could, in fact, sell its station. When an applicant makes an unconditional and timely commitment to divest, no additional showing is necessary. *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 55 RR 2d 1299, 1302 (Rev. Bd. 1984), *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984) (commitment accepted even though prior to the hearing the station owner had made no attempt to sell the station, did now know what it was worth or what he would do if he received no offers). *See also Northern Sun Corporation*, FCC 85R-23 (Rev. Bd., released March 13, 1985); *WHW Enterprises*, 89 FCC 2d 799, 813-14, 51 RR 3D 409, 4L9 (Rev. Bd. 1982), *rev. denied*, FCC 83-368, released September 15, 1983, *rev'd in part and remanded on other grounds*, No. 83-2067 (D.C. Cir. February 5, 1985).

115. Adelphi and Burlington 48 further question Ms. Brunson's ability to sell her Baltimore station. They maintain that there is no assurance that the Commission will permit the assignment of the authorized but still unconstructed nighttime facilities; nor that it will authorized assignment to a minority purchasers; or that the station will be marketable without the nighttime facilities. However, these assertions rest solely on speculation and conjecture and lack any basis in the record or in Commission precedent. There is no evidence that Ms. Brunson does not intend to construct nighttime facilities at WEBB, in accordance with the FCC's authorization. Ms. Brunson purchased the land for the nighttime facilities, and would be operating those facilities now except for the difficulty it has encountered in receiving zoning approval (Tr. 882, 1844-46, 1932-33, 1941). Further, if the nighttime facilities are constructed, and BCI is awarded the construction permit for Channel 48, there is no FCC rule or precedent which would require Ms. Brunson to sell WEBB only to a minority. In fact, as Adelphi points out, the Commission has approved the transfer of an Arizona station with a similar waiver to a non-minority buyer. *Hispanic Communications Corporation* (FCC No. BAL-820416GF, granted February 16, 1983). Moreover, there is no evidence in the record that WEBB could not be sold to a minority buyer or that WEBB could not be sold without its nighttime facilities having been constructed. The sales price might be somewhat lower, but that is all. Even if the station was unprofitable as a daytimer and had to be sold at a loss, there is no indication that Brunson would cling to a money-losing WEBB

at the cost of forfeiting the more valuable Burlington permit. Simply, put, BCI's competitors have failed to conjure up any realistic obstacle to the divestiture of WEBB.

116. Adelphi attempts to attribute the media ownership interest of Security Pacific Capital Corporation (SPCC) an affiliate of FSBIC to BCI. This effort is unsupportable. Initially, since FSBIC's conversion/purchase rights depend on a contingency which is beyond its control, *i.e.*, Ms. Brunson's ability and intent to buy back the conversion rights, the convertible debentures cannot be deemed a cognizable interest. *Washington's Christian Television Outreach, Inc.*, 56 RR 2d 1539, 1555 n. 68 (Rev. Bd. 1984). Moreover, even if one were to assume, *arguendo*, that FSBIC had a cognizable interest in BCI, the media interest helds by SPCC are too attenuated to be given weight under the diversification criterion.

117. Adelphi also argues that if Brunson is awarded the construction permit for Channel 48 and sells its existing stations, the "net impact" on diversification would be "negative," since no commitment has been made that these stations will be sold to other minorities. Adelphi PC. ¶ 28. This argument must be rejected because Adelphi has cited no instance where the Commission has recognized a "negative net impact" on diversification or minority ownership in the context of a divestiture commitment. Adelphi's contention, if accepted, would penalize a minority owner who seeks to acquire new broadcast facilities, and would greatly restrict the alienability of minority-owned stations. The Commission has never suggested such a policy.

118. Signal will be awarded a diversification demerit because of the other broadcast interests of three of its trustees, R. Russell Bixler, David F. Kelton and Oleen Eagle. These three trustees all have key roles in Western Pennsylvania Christian Broadcasting Company, licensee of WPBC-TV, Greensburg, Pennsylvania and permittee of WKBS-TV, Altoona, Pennsylvania. The interests of these Signal principals are significant because they control the other two television stations, the two stations are located in the same region as the proposed Burlington station, and they serve a substantial number of people. However, the media holdings are not in the proposed community of license or service area. Therefore, Signal will receive a moderate demerit under the diversification criterion.

119. The other broadcast interests of Burlington 48's shareholders are even more significant. Chesapeake TV Inc., a shareholder of Burlington 48, is the licensee of station WBFF-TV in Baltimore. Commercial Radio Institute, a 33% shareholder of Chesapeake, is the license of WPTT-TV, Channel 22, Pittsburgh, Pennsylvania and WTTE-TV, Channel 28, Columbus, Ohio. Baltimore is only about 100 miles from Burlington, and Pittsburgh is less than 300 miles away. Four of the seven individual shareholders of Burlington 48 collectively own 62.2% of Chesapeake, and these individuals, plus Duncan Smith, collectively own 62.3% of CRI. In addition, Julian Smith, Frederick Himes, B. Stanley Resnick and CRI control Bay Television, Inc., permittee of Channel 38, St. Petersburg, Florida. In light of these significant media interests, the fact they are in the same service, and the proximity of two of the television stations to Burlington, Burlington 48 will be given a moderate to substantial diversification demerit.

Best Practicable Service

Integration

120. In evaluating the applicant's integration proposals, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners — including such matters as minority and female participation, local residence, past participation in civic affairs, and broadcast experience. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated" (*Policy Statement, supra*, at 395). The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Also, no integration credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied*, FCC 79-397, released June 22, 1979. Similarly, consultative positions will be given no weight. *Policy Statement*, 1 FCC 2d at 395. Thus, no integration credit will be awarded where a principal proposes to work in a non-managerial position. *Bradley, Hand and Triplett*, 89

FCC 2d 657 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1095 (Rev. Bd. 1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 839 (Rev. Bd. 1981); *Vacationland Broadcasting Company*, 55 RR 2d 1299, 1305 (Rev. Bd., 1984).

121. Signal seeks 60% full-time integration credit for the proposals of Mr. Kelton, Mr. Fenton, and Ms. Harris and 20% part-time integration credit for Mr. Bixler. Signal is a non-stock, non-profit corporation controlled by a five member board of trustees. Mr. Fenton and Ms. Harris are two of the trustees. Adelphi argues that integration credit is dependent on a "reasonable prospect of stability in the ownership and management" and that recognition of the involvement of directors depends on whether they have "personal interest and responsibility comparable to owners", citing *Farragut Television Corp.*, 8 FCC 2d 279, 282 (1967). Adelphi contends that Mr. Fenton and Ms. Harris, who joined Signal, on or shortly before the B-cut-off date, have failed the *Farragut* test. The contention is rejected. Mr. Fenton and Ms. Harris's involvement in Signal satisfies the criteria set forth in *Roanoke Christian Broadcasting, Inc.*, 52 RR 2d 1725 (Rev. Bd. 1983). Among other things, Mr. Fenton has been involved in preparation and review of the application and amendments thereto (Tr. 280–81) and is committed to work at the station in a mangement level position. Similarly, Ms. Harris' commitment to Signal is underscored by the fact that she terminated her former employment, is already working for Signal full-time, and has committed to terminate most of her outside activities if they interfere with her commitment to Signal. Moreover, contrary to the assertions of Burlington 48 and Adelphi, the Board has rejected the concept that prior, long-term involvement is an application is a talismanic indication of whether or not a principal will work at a station. *Roanake, supra*, 52 RR 2d at 1727.

122. Signal, however, merits no credit for the proposed integration of Dorothy Harris because she will not perform a policymaking function at the station. As Director of Personnel, she will make recommendations, but not decisions. Likewise, Ms. Harris' second proposed position as assistant general manager will impose no specific duties on her at all. She will do whatever she is told to do by the general manager. Signal has not defined a genuine managerial position for Ms. Harris and deserves no integration credit.

123. Mr. Fenton's full-time integration proposal will be credited. Mr. Fenton intends to reduce his commitments to New Covenant Church and Trinity Fellowship Church to 20–25 hours per week. In addition, his work schedule is flexible, with no set hours. Under the circumstances, Mr. Fenton's proposal to devote 40 hours per week to the proposed station is fully capable of effectuation. Signal will not receive credit for Mr. Bixler's proposed part-time integration. Mr. Bixler's proposed duties as Signals's Director of Public Relations and Director of Ministries do not rise to the level of management positions. As Director of Ministries, Mr. Bixler will not have actual responsibility for supervising and training employees. Rather, the counseling coordinator will have that day-to-day responsibility. Similarly, his duties as Director of Public Relations will not involve supervising employees. In addition, Mr. Bixler's claim that he will devote a minimum of 20 hours per week to the Burlington station is not credible in view of his extraordinary time commitments elsewhere (Findings 15–21). Even assuming his 20 hour proposal was credible, Mr. Bixler's testimony makes clear that he does not propose to devote to the station substantial amounts of time *on a daily basis*, as required by the *Policy Statement*, 1 FCC 2d 393, 395 (1965); *Bay Television, Inc.*, FCC 85–58, released March 25, 1985.

124. Signal will receive 40% full-time quantitative integration for Mr. Fenton's and Mr. Kelton's participation. Signal receives 20% minority enhancement credit since Mr. Fenton is Black. Signal also receives 20% local residence credit since Mr. Fenton has resided within the proposed service area as well as credit for his civic participation. Signal is also entitled to enhancement credit for Mr. Kelton's commitment to move to Burlington and for his broadcast experience.

125. BCI receives 100% quantitative integration credit for the proposed integration of Dorothy Brunson into the management of the station. Ms. Brunson will work full-time as the proposed station's General Manager. BCI receives substantial enhancement credits for 100% minority and female integration. *Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982), *aff'd, West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984); *New Continental Broadcasting Co.*, 96 FCC 2d 544 (Rev. Bd. 1983); *Radio Jonesboro, Inc.*, 57 RR 2d 1564 (1985). BCI also receives substantial enhancement credit for Ms. Brunson's extensive broadcast experience which includes owner/manager of three broadcast stations. BCI is also entitled to slight credit for Ms.

Brunson's commitment to move to Burlington. *Policy Statement*, 1 FCC 2d at 396.

126. BCI's competitors do not question Ms. Brunson's representations concerning her management experience with WLIB(AM) where she served as General Manager and Vice President or her management of the stations she has acquired. They claim, however, that she made misrepresentations concerning her employment at WWRL(AM), where she worked from 1964–1968, and propose sanctions ranging from a comparative demerit to disqualification. There is no basis for imposition of a sanction. There is no evidence that Ms. Brunson has misrepresented facts to the Commission. No less than six hundred transcript pages have been devoted to a microscopic examination of events occurring at WWRL some 15 to 20 years ago. To the extent that Ms. Brunson may have erred on some detail, it is clear that such error was due to faculty recollection, and not intentional deception. The Presiding Judge had countless opportunities to observe Ms. Brunson and is convinced that she testified truthfully at all times.

127. Furthermore, Ms. Brunson's testimony as to her responsibilities at WWRL is largely corroborated by two other witnesses, including Mary Ann Ward, who was produced by Adelphi. Also, the only piece of documentary evidence presented on this subject corroborates Ms. Brunson's testimony and directly contradicts the testimony of Mr. Sonderling and Mr. Ward. Thus, the WWRL check dated December 24, 1964, which was co-signed by Ms. Brunson supports her statement that she had the authority to sign checks for the station. It also refutes Mr. Ward's and Mr. Sonderling's assertions that Ms. Brunson did not have check writing authority. This check also supports Ms. Brunson's testimony that she was the bookkeeper at WWRL, despite the Sonderling and Ward claims to the contrary.

128. Aside from the fact that the witnesses called by Adelphi failed to disprove Ms. Brunson's testimony, there is no conceivable motive for Ms. Brunson to misrepresent her duties at WWRL. The only motive suggested by the parties is enhanced broadcast experience credit. That suggestion does not survive reflection. Ms. Brunson's seven years of significant managerical responsibility at Inner City Broadcasting Corporation (WLIB) and her years of experience as an owner/manager already entitle her to the maximum credit for broadcast experience. Since Ms. Brunson has not misrepresented facts to the Commission, she is entitled and will receive 100% integration credit.

129. Burlington 48 seeks 48% integration credit for the proposed full-time integration of three of its shareholders: John L. Harrison, Jr., Operations Manager; James R. Smith, General Manager; and B. Stanley Resnick, Business Manager. Mr. Resnick's 8.5% interest will be credited. He also receives slight credit for his intention to maintain a residence in Burlington. However, Burlington 48 will receive no integration credit for Mr. James Smith's and Mr. Harrison's proposed participation in light of the fact that Burlington 48 is controlled by Julian Smith and his associates, and the fact that these shareholders are required to sell up to two-thirds of their stock in Burlington 48 to Chesapeake TV, Inc., another of Julian Smith's companies.

130. Julian Smith is president, director and 17% shareholder of Burlington 48. Except for Mr. Harrison and Mr. James Smith, the shareholders of Burlington 48 are involved in other broadcast businesses with Julian Smith. Julian Smith and his associates hold five out of the seven seats on Burlington 48's Board of Directors, and will control and manage Burlington 48. This Board will determine the funding for the station, the management of the company, and makeup of the board of directors and officers. Julian Smith is the dominating presence on the Board, for his associates have never acted contrary to his wishes.

131. Julian Smith sought the participation of John Harrison and James Smith in Burlington 48 only to enhance Burlington 48's comparative position. Both Mr. Harrison and James Smith are black and reside in the station's proposed service area. It is not improper for an applicant to structure its proposal in a manner that is believed most likely to prevail in a comparative proceeding if the proposal is *bona fide*. Here, however, it is apparent that the ownership arrangement is a sham. It is clear that Julian Smith never intended these individuals to be true owners of the station. This is evidenced by the fact that Chesapeake TV, Inc. (controlled by Julian Smith) has the right to purchase up to two-thirds of their shares. Since the findings compel the conclusion that Burlington 48 is and will be controlled by Julian Smith and that recognizing Mr. Harrison's and Mr. Smith's ownership interest[15] would be inconsistent with the purposes behind the integration criterion, no integration credit will be awarded. See *KIST Corp.*, 58 RR 2d 1483 (1985).

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[15] Mr. Harrison and James Smith would be entitled to no more than 16% integration credit.

132. BBL will receive 100% quantitative integration credit. Robert Barnett, who is Black, and Gordon MacInnes, BBL's two general partners propose to work in management-level positions at the station. BBL is a bona fide limited partnership. BBL's general partners will have full and exclusive power to manage, control and operate the business affairs of the partners. While it is true that Mr. MacInnes is the moving force behind the BBL application, there is no evidence which would suggest that Mr. Barnett's 60% voting ownership interest is not *bona fide*. Mr. Barnett will serve as station manager and the record indicates he will have a legitimate interest and influence in the partnership consistent with the underlying objective of the integration credit. See *KIST, supra*. Mr. Barnett receives the following enhancement credit for his 60% voting interest: minority credit, moderate local residence credit, moderate civic participation credit, and slight broadcast experience credit since his broadcast experience appears primarily confined to production duties and does not involve management level positions. Mr. MacInnes (40% partner) receives very slight local residence credit since his residence in the service area ended in 1970, some 16 years ago. Mr. MacInnes also receives slight to moderate broadcast experience credit for the approximately four years he served as executive director of the New Jersey Public Broadcasting Authority.

133. The parties assert that BBL's integration credit should be reduced because BBL initially reserved 31.5% of its equity. They urge that is should be presumed that the 31.5% reserved interest would be used to admit an additional general partner. That presumption, however, has no basis in law or fact. BBL could not have admitted a new 31.5% general partner because if it had, over 50% of BBL's voting control would have changed and BBL would have been eliminated from comparative consideration. See Section 73.3573(b). Also, the findings establish that the only reason BBL's general partners reserved a portion of BBL's equity was in anticipation of admitting additional limited partners. There is no factual basis for attributing that reserved equity to a fictional general partner.

134. It is also contended that BBL should not receive full credit for its proposal to integrate Mr. Barnett since, it is argued, he will not be able to contribute his share of BBL's future capital needs and his interest in BBL, therefore, will be diluted. The contention that Mr. Barnett's interest will be diluted is sheer speculation, and the record in this proceeding refutes it. The

record establishes that Mr. Barnett already had contributed $1200 of his own funds to BBL, and has taken steps, including the securing of bank letters in the amounts of $120,000 and $165,000 to assure himself of the availability of additional funds in the event of a grant (Tr. 1101-04, 1161, 1180). Mr. Barnett's two bank letters are far more than his total current commitment to BBL, thereby providing for the contingency that his commitment becomes higher under the revised capital plan (Tr. 1103-04). His discussions with other persons, moreover, leads him to believe that it will be an easy matter to obtain additional funding if and when BBL's application is granted (Tr. 1171). BBL will receive full credit for its proposal to integrate Mr. Barnett.

135. Adelphi seeks credit for the proposed full-time integration of its three "voting" shareholders. Nancy Ginzel proposed to serve as the general manager, Barbara Anderson proposes to be the Human Resources Director, and Beverly Harper proposes to be the Community Affairs Director. Adelphi is not entitled to 100% quantitative integration credit, however, because Adelphi failed to demonstrate that these shareholders will have exclusive control over the management and operation of the station. Adelphi is entitled to a maximum of 33.60% quantitive credit, which represents the total beneficial interest those shareholders own in Adelphi at the present time.

136. Adelphi's corporate structure is clearly a sham formulated only for purposes of achieving a favorable litigation posture. All the Adelphi shareholders intend to work in a management position at the station. However, in order to benefit from the FCC's policies which promote minority ownership of broadcast facilities, Adelphi claimed to have two classes of stock: common voting stock and non-voting stock, and issued the "voting" stock only to the three minority members of the group. These three were also designated as the only directors and officers of the corporation.

137. Adelphi's claim that there are two distinct classes of stock is belied by the fact that the alleged "nonvoting" shareholders have participated in the affairs of the corporation to the same extent as the alleged "voting" shareholders. The non-voting shareholders were the impetus behind the formation of the group and they had the primary role in organizing the entity, communicating with counsel and representing the corporation. The non-voting shareholders have been invited to and have participated in all the meetings of the corporation. They have participated in all discussions of substantive corporate matters. In the words of an

Adelphi shareholder, there is, in fact, a "false distinction" between those who vote and those who do not vote. The shareholders do not really vote at all. Rather, Adelphi operates as a "group of six," with all shareholders discussing substantive matters and coming to a "consensus" as to the corporation's position.

138. Although all the stock of Adelphi must be recognized as voting stock, Adelphi cannot now seeks to receive credit for the proposed integration of Andrea Cetera, Peggy Filis-Burkhardt and Robin Reibel, the previously designated "nonvoting" shareholders. The proposed integration of non-voting shareholders is entitled to no comparative credit. *Greater Wichita Telecasting Inc.*, 96 FCC 984, 55 RR 2d 926 (1984). The fact that is it later proven that these individuals actually hold voting stock does not alter the analysis. Adelphi was not seeking integration credit for these three shareholders prior to the B cut-off date in this proceeding. In fact, the testimony offered by Adelphi regarding these three shareholders' proposed integration was received into evidence by the Presiding Officer *only for purposes of impeaching the credibility of the integration proposals* of the alleged "voting" shareholders and not for comparative purposes (Tr. 189). Therefore, to allow Adelphi credit at this time for the proposed integration of its former "nonvoting" shareholders would be an impermissible upgrade. *Cf. Washington's Christian Television Outreach*, 56 RR 2d 1539, 1548 n. 30 (Rev. Bd. 1984) Such a result would, in effect, reward Adelphi for its sham proposal. Adelphi cannot have it both ways. It cannot first pretend that it has two classes of stock and that it is entitled to 100% integration because all its "voting" shareholders will work at the station, and then, when it is revealed that its corporate structure is a sham, seek 100% integration credit on the basis that all its shareholders, voting and nonvoting, will work at the station. To award Adelphi integration credit for its alleged "nonvoting" stockholders;

> . . . would make a mockery of the underlying objective of the integration criterion. It would also result in unfairness to the other applicant in this proceeding and it would frustrate all other comparative proceedings by encouraging other applicants to follow this same facade.

Henderson Broadcasting Co., Inc., 63 FCC 2d at 426, 39 RR 2d at 1109. Therefore, Adelphi will only receive 33.60% quantitative credit which represents the total beneficial interest of Ms. Anderson (3.41%), Ms. Ginzel (25.41%), and Ms. Harper (4.78%).

139. Adelphi's integration proposal is enhanced by the fact that all three integrated principals are black. Adelphi is also entitled to lcoal residence and civic participation credit for Ms. Anderson and Ms. Harper. Adelphi is also entitled to slight credit for Ms. Ginzel's commitment to move to the service area and her broadcast experience. Adelphi is not entitled to broadcast enhancement credit for Ms. Anderson or Ms. Harper since neither has been employed at a broadcast station.

Final Comparative Evaluation

140. Signal receives a moderate diversification demerit. Burlington 48 receives a moderate to substantial diversification demerit. BCI, BBL and Adelphi do not receive diversification demerits. Signal receives 40% full-time integration credit; Burlington 48 receives 8.5% full-time integration credit; Adelphi receives 33.60% full-time integration credit; and BBL and BCI receives 100% full-time integration credit. The choice is clearly between BBL and BCI. Since BCI's qualitative enhancement credits (substantial minority, female and broadcast experience credits) far outweigh the enhancement credits awarded to BBL (see Conclusion 132), BCI is the clear winner and will be awarded the construction permit.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Brunson Communications, Inc. IS GRANTED and the applications of Signal Ministries, Inc., Burlington 48, Inc., Burlington Broadcasters, Ltd., and Adelphi Broadcasting Corporation ARE DENIED.[16]

IT IS FURTHER ORDERED, That the grant of Brunson Communications, Inc.'s application IS CONDITIONED as follows:

> Prior to the commencement of the television station authorized herein, permitte shall certify to the Commission that Dorothy E. Brunson, Clyde Porter and Naomi Campor have divested themselves of all interest in and connection with Brunson Broadcasting Co. of Maryland, Inc., licensee of AM station WEBB, Baltimore, Maryland, Brunson Broadcasting Co. of Georgia, Inc., licensee of AM station WIGO, Atlanta, Georgia, Brunson Broadcasting Co. of North Carolina, Inc., licensee of AM station WBMS,

[16] In the event exceptions are filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(b).

Wilmington, North Carolina, and any broadcast station acquired prior to the final grant of this application.

Prior to construction of the tower authorized herein, permittee shall notify AM station WPGR so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintainance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and prior to or simultaneous with the filing of the application for a license to cover this permit, the results submitted to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

Antenna, Adequacy Issue
Candor
Frequency Equitable Distribution of Under 307(b)
Harassment

In hearing proceeding involving two mutually exclusive applications for authority to operate on former clear channel 660 kHz, applicant proposing first competitive commercial nighttime transmission service to its community of license (pop. 13,009) was winner under Section 307(b) issue over an applicant proposing twentieth commercial aural service to much larger community (pop. 366,383). Minority ownership is not a Section 307(b) factor even if channel in question involves a former clear channel frequency. Site intervention and lack of candor issues against winner resolved in its favor. Remand not necessary to determine performance capabilities of PARAN antenna proposed by a winner.
—*Valley Broadcasters, Inc.*
BC Docket No. 82-436

FCC 86R-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
VALLEY BROADCASTERS, INC. KAPS, Mount Vernon, Washington	BC Docket No. 82-436 File No. BP-801112AB
NORTHWEST INDIAN WOMEN BROADCASTERS, INC. Portland, Oregon	BC Docket No. 82-437 File No. BP-801113AD

Appearances

Lester W. Spillane, on behalf of Valley Broadcasters, Inc., and *Donald E. Ward* and *Chester F. Naumowicz*, on behalf of Northwest Indian Women Broadcasters, Inc.

DECISION

Adopted: August 22, 1986; Released: September 3, 1986

BY THE REVIEW BOARD: JACOBS, BLUMENTHAL, AND ESBENSEN.

BOARD MEMBER ESBENSEN:

1. This proceeding involves the mutually exclusive appplications of Valley Broadcasters, Inc. (Valley) and Northwest Indian Women Broadcasters, Inc. (Indian Women) for authority to operate an AM broadcast station on 660 kHz at Mount Vernon, Washington and Portland, Oregon, respectively. Valley, licensee of Station KAPS which currently operates on 1470 kHz, 500 watts, daytime only, with a directional antenna, proposes to modify its facilities to operate fulltime on the new frequency with increased power (10 KW-LS). Indian Women, in turn, proposes to construct a new fulltime facility in Portland (50 kW-LS). Both facilities would operate with substantially less power at night. By *Memorandum Opinion and Order*, 47 Fed. Reg. 34621, published August 10, 1982, these applications, along with four others no longer in the proceeding, were designated for hearing on, *inter alia*, an antenna effectiveness issue against Valley, a Section 307(b) issue, and, in the event that a choice could not be made under the Section 307(b) issue, the standard comparative issue. Thereafter, presiding Administrative Law Judge (ALJ) Byron E. Harrison added issues to determine whether Valley impermissibly attempted to deprive Indian Women of its transmitter site or displayed a lack of candor by knowingly submitting to the Commission misleading incomplete documents relating to the availability of Indian Women's proposed site. The antenna effectiveness issue was resolved favorably to Valley prior to hearing through summary decision. *Memorandum Opinion and Order*, FCC 83M-935, released March 21, 1983.

2. In an *Initial Decision* (*I.D.*), FCC 86D-9, released February 13, 1986, the ALJ granted Valley's application based on the Section 307(b) issue. In so doing, he resolved favorably to Valley the site intervention and lack of candor issues, which he characterized as "investigation issues," but added that Indian Women would have been the superior comparative applicant had Valley not prevailed on the Section 307(b) issue. The proceeding is now before the Review Board on exceptions filed by Indian Women and limited exceptions filed by Valley. We have reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held

before a panel of the Board on May 30, 1986, and our examination of the record. We adopt the *I.D.'s* findings of fact and conclusions of law, except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of Valley's application would best serve the public interest, convenience, and necessity. Because only basically qualified applicants are entitled to either Section 307(b) or comparative consideration, *see Louis Adelman*, 29 FCC 1223, 18 RR 106a (Comm'n 1960), *aff'd sub nom. Guinan v. FCC*, 297 F. 2d 782 (D.C. Cir. 1961), we will initially address the potentially disqualifying issues.

3 *Site Intervention.* By *Order*, FCC 83M-4672, released December 14, 1983, the ALJ enlarged the issues in this proceeding to explore the facts and circumstances surrounding an investigation of Indian Women's transmitter site by Valley to determine whether Valley impermissibly attempted to deprive its adversary of a transmitter site. The findings of fact on this matter are set forth in detail in paragraphs 20-32 of the *I.D.* and need only be highlighted here. Under Indian Women's site plan during the period in question (Indian Women amended to propose a new site. *See Valley Broadcasters, Inc.*, 95 FCC 2d 448, 54 RR 2d 883 (Rev. Bd. 1983)), that applicant proposed to utilize the single existing radio tower of Station KLIQ, which is located in an amusement park known as Oaks Park, and extend the KLIQ ground system onto the adjacent lands owned by Portland General Electric (PG&E) and the Oregon Yacht Club (OYC). After Indian Women's sole owner, Elizabeth David, submitted a sworn statement attached to an amendment filed in early 1983 that Indian Women had permission to use the properties of PG&E and OYC for an extension of the KLIQ existing ground system, Valley began investigating Ms. David's claims. *I.D.*, Findings, para. 20. James J. Keane, Valley's general manager and 40% stockholder, visited Portland in March 1983 and interviewed David Larsen of PG&E, Robert Bollinger, owner of Oaks Park, and Vice-Commodore Larry R. Taylor of OYC. *Id.*, at paras. 20, 22, 26. From his discussions, Keane learned that although Indian Women had made preliminary efforts to effectuate its transmitter site proposal, Indian Women apparently had not received permission from PG&E or OYC to extend its proposed ground system onto their lands (*id.*, at paras. 20, 26), nor had it obtained permission from the Oaks Park owner to construct a 50 kW station on his land (*id.*, para. 24). Subsequently, upon his return to Mount Vernon, Keane once more contacted Vice-Commodore Taylor after learning that Indian Women had resubmitted an earlier rejected directional antenna

amendment calling for a tower at the OYC site. *Id.*, at para. 27. Mr. Keane asked Taylor whether he was aware of "potential" environmental, health, and safety problems that might result from such an operation, and, upon finding that Taylor was unfamiliar with such problems, Keane sent information to Taylor that had been the subject of pleadings filed in the proceeding and advised him to seek independent engineering advice on the matter. *Id.* The only other contacts with Bollinger and Taylor were made by Bob McClanathan, a Portland, Oregon engineer retained by Valley's consulting engineer to help with the Indian Women site questions. *Id.*, at para. 28. Prior to the investigation conducted by Mr. Keane, McClanathan spoke briefly with Taylor and mentioned that the Indian Women proposal would cause radio and television interference. *Id.* He also wrote a letter to Mr. Bollinger of Oaks Park, using information taken from the pleadings filed in an earlier motion to enlarge issues, explaining how a 50 kW AM radio station could create potential safety hazards to users of the amusement park. *Id.*, at para. 30. The letter asserted in pertinent part that a significant area of the Oaks Amusement Park would have to be plowed up to accommodate the proposed ground system extension of KLIQ and that the effect of 50,000 watts of high power radio frequency (RF) energy could preclude public use of the area within close proximity of the KLIQ tower during daytime hours.

4. The *I.D.* concluded that the investigation, as conducted, was reasonably related to an objective of the proceeding, *i.e.*, to determine the *bona fides* of Indian Women's transmitter site at Oaks Park and adjoining properties (*I.D.*, Conclusions, para. 23), that is was "conducted within the parameters of acceptable inquiry in an adversary proceeding" (*id.*, at para. 24), and that the claim of "scare tactics" that allegedly resulted in the loss of Indian Women's transmitter site was not supported by the record (*id.*, at para. 21). Indian Women contends in its exceptions, however, that McClanathan was initially "dispatched" "to plant the seed that Indian Women would be a dangerous and destructive tenant or neighbor," and the "seed was nurtured by Keane who . . . devoted his contacts to reinforcing McClanathan's warnings as to the electrical consequences which would supposedly befall those in proximity to Indian Women's proposed operation." Indian Women Br. at 25.

5. Indian Women's exceptions on this matter are insufficient to overturn the ALJ's sound analysis. It is well-established that an applicant exposes itself to a reasonable and proper search of its

credentials when it voluntarily places itself in an adversarial posture. *See Chronicle Broadcasting Co.*, 40 FCC 2d 775, 799, 27 RR 2d 743, 771 (1973). This is not to say, however, that there are no boundaries to the permissible scope of an investigation of adversaries, that is,"[c]arried too far, the investigation becomes a method of harassment and attempted intimidation." *Chronicle Broadcasting Co.*, 19 FCC 2d 240, 244, 16 RR 2d 1014, 1019 (Rev. Bd. 1969)(harassment issue added). The Commission has held that the "manner in which the investigation was conducted, its scope, and the purpose for which it was instituted are all factors to be considered in determining whether it was proper and permissible." *Chronicle Broadcasting Co., supra*, at 799-800, 27 RR 2d at 771. Thus, tactics carried out in the guise of legitimate investigatory functions will not be tolerated when they can have no other purpose than to "impede, frustrate and obstruct" the prosecution of an adversary's application. *See WIOO, Inc.*, 54 FCC 2d 692, 708, 34 RR 2d 1093, 1112 (Rev. Bd. 1975). Here, the purpose underlying the commencement of Mr. Keane's investigation was permissible, *i.e.*, to investigate Indian Women's claim that it had permission to use the three properties for its antenna and ground system. Moreover, there is no record evidence to indicate that the manner and scope of Mr. Keane's investigation was anything other than reasonable and proper. He merely interviewed the responsible site personnel to ensure that they had not given final approval to Indian Women to effectuate its site proposal. The only matter that could potentially reflect adversely on Valley's qualifications was Mr. Keane's forwarding of information to Vice Commodore Taylor relating to the possible hazards to OYC residents, and the McClanathan letter to Bollinger pointing out the safety hazards for the amusement park users.[1] This information, however, was already the subject of pleadings filed in this case, and we have previously held that "an applicant should [not] be disqualified for disclosing pleadings which are already a matter of public record." *WIOO, Inc., supra*, at 710, 34 RR 2d at 1113. In sum, we are of the view that the ALJ cogently put the facts in

[1] Although Valley states that it did not direct McClanathan's contacts with Bollinger, a licensee is held strictly accountable for all such activities. It is "incumbent upon the licensee not only to choose responsible investigators but to impress upon them the need to adhere closely to legitimate means and purposes in the investigation; and that the investigator's failure in these respects will reflect adversely upon the licensee, and in a particularly flagrant case can even be disqualifying." *Chronicle Broadcasting Co., supra*, at 801, 27 RR 2d at 773.

this case into their proper perspective when he observed (*I.D.*, Conclusions, paras. 20–21):

> As to RF burn problems, Northwest Indian Women made none of these matters known to the parties it was dealing with on use of the land . . . Mr. McClanathan is an experienced engineer and he has experience with RF burn problems. He described the possibility of burns with a 50 kW operation such as Northwest Indian Women proposed.
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> ***

Further, when Valley did make such contacts and found that OYC and PG&E knew little of the actual Northwest Indian Women proposal and, other than rumors, Mr. Bollinger knew nothing of the proposal, it was appropriate to advise them of the nature of the Northwest Indian Women proposal and what the hearing record so far reflected about the proposal. The record contains no support for the scare tactics charged to Valley by Northwest Indian Women.

6. *Lack of Candor.* By *Order*, FCC 83M–4672, *supra*, the ALJ specified an issue to determine whether Valley lacked candor by knowingly submitting to the Commission misleading incomplete documents relating to the availability of Indian Women's proposed transmitter site. Specifically, the document in question concerned a notarized letter, dated March 23, 1983, addressed to Keane and signed by Larsen of PG&E, which was attached to Valley's March 31, 1983 opposition to an amendment filed by Indian Women. Indian Women had retendered a previously rejected directional antenna amendment incorporating extensions of the existing KLIQ ground system onto land owned by PG&E. Valley in opposition argued that Indian Women did not have the ability to directionalize because it lacked a site upon which it could construct the facilities it proposed, citing the Larsen letter above and Keane's affidavit which asserted that Bollinger would not permit anyone to install a new ground system in the Oaks Amusement Park. Larsen's letter (*I.D.*, Findings para. 20) stated in relevant part that he had "never talked with Elizabeth David [Indian Women's sole owner] or anyone representing her or that company" and that PG&E had "given no permission to anyone to make sure use of our land bordering the Oaks Amusement Park or Oregon Yacht Club." Previously, on March 7, 1983, Larsen had sent another letter to Keane which contained the following additional pertinent comment:

> In response to your question, the attached letter, obviously meant for Portland General Electric Company to sign and send to Mrs. Elizabeth David of the Northwest Indian Women Broadcasters, arrived in our office with no explanation. We sent her the attached letter requesting more information concerning her plans.

The March 7 letter, however, added in conformity with the March 23 letter:

> As a direct statement on our involvement with Mrs. David, we have had no other communication, and have given no permission for use of our land bordering the Oaks Amusement Park.

Keane testified at hearing that he had requested Larsen to prepare the second letter because the first included extraneous materials and he wanted to confine Larsen's statement to the question of whether permission had been granted by PG&E to extend the KLIQ ground system onto its land. *Id.*

7. The *I.D.* rejected Indian Women's claim that Valley lacked candor in not enclosing the March 7 letter with its opposition and concluded that in any event Indian Women did not have permission to extend the KLIQ radials onto the land owned by PG&E and OYC. *I.D.*, Conclusions, para. 19. Indian Women contends in its exceptions that the ALJ misconstrued the issue, basing his resolution of the matter on whether Indian Women had permission to extend its radials onto the PG&E land. It asserts that the pertinent question here is whether Valley, in making representations to the Commission, withheld evidence of communications between Ms. David and PG&E, contained in the March 7 letter, which tended to refute Valley's charge that Indian Women lacked reasonable assurance of a right to use the PG&E land. Indian Women argues that the facts of this case bear a remarkable similarity to the facts and circumstances found to constitute a disqualifying lack of candor in *RKO General, Inc.*, 78 FCC 2d 1, 47 RR 2d 921 (Comm'n 1980), *aff'd*, 670 F. 2d 215 (D.C. Cir. 1981).

8. We will deny Indian Women's exceptions concerning this issue. At the outset, our exceptor is in error that the issue was resolved on the basis that it lacked permission to extends its radials onto the PG&E land. Although the ALJ devoted a substantial portion of his *I.D.* to the question of "permission," he also held in paragraph 19 of his conclusions that Indian Women's allegations of lack of candor were not supported by the record. We agree. While the March 7 Larsen letter is more informative than the later letter, and arguably should have been filed with Valley's opposition, it would have continued to demonstrate that

Indian Women lacked permission to use the PG&E land, which was the purpose for which the March 23 letter was filed. Contrary to Indian Women's claim, the March 7 letter by its terms does not refute the argument that Indian Women lacked reasonable assurance of a right to use the land.[2] Hence, it does not provide any basis for concluding that Valley lacked candor. Furthermore, Indian Women's reliance on *RKO General, Inc., supra*, in support of Valley's disqualification is thoroughly misplaced. The portion of *RKO* alluded to concerned a whole sequence of statements by RKO that the Commission found to be "quite disturbing" 78 FCC 2d at 97, 47 RR 2d at 998. Thus, for example, the Commission observed that RKO could not in truth state there was "no factual or legal foundation" for charges concerning bribes and improper payments to foreign government officials when officials of its parent company knew otherwise, nor could RKO state that is opponent "does not assert any improper political contributions by [its parent] in the United States" at a time when top executives of its parent had known for years that such conduct had occurred and been active participants in the improper activities. *Id.* at 96-97, 47 RR 2d at 997-998. In short, that case is substantially different from the facts involved here.

9. *Antenna Effectiveness — PARAN Antenna.* Valley proposes to use a Perimeter Current (PARAN) Antenna which apparently has been successfully used in other countries but has found widespread commercial use in the United States. Briefly, the PARAN system usually consists of four towers of equal height arranged in a "square" with the distance between their bases equal to the height of the towers. The system is useful in restricted height locations, or in situations like that faced by Valley here, where there is limited ground area available. In essence, the system radiates a non-directional AM signal substantially comparable to that of a monopole tower. The hearing designation order specified an issue to explore Valley's proposed PARAN system's performance capabilities as they relate to the Commission's technical requirements on the ground that the

[2] The *I.D.* raises a substantial question as to whether Indian Women ever had reasonable assurance of its original transmitter site. As recently observed, "the Board and Commission have no compunction against disqualifying an applicant where it has shown that such applicant had no legitimate basis whatever for claiming that it had reasonable assurance to a transmitter site it claimed as likely available to it." *Mary Ann S. Bohi*, FCC 86R-21, released April 11, 1986 (Separate Statement of Board Member Blumenthal). However, no transmitter site availability or misrepresentation issues were ever sought, and it would be superfluous in light of our disposition here to remand this proceeding on those issues.

effectivness of this type of antenna has not been established in the United States. 47 Fed. Reg. 34621, *supra*, at para. 10. The designation order further noted that it was unclear whether the applicant proposed 100 or 120 foot towers or how the towers would be configured, and directed Valley to file a clarifying amendment. *Id.* The clarifying amendment was filed on September 8, 1982. Thereafter, on January 26, 1983, Valley filed a motion for summary decision accompanied by an engineering report prepared by its consulting engineer describing the electrical performance of the system. The applicant argued that the engineering report established that the PARAN system would meet the Commission's technical standards. Comments in support of Valley's motion were filed by the Mass Media Bureau representing that the "Bureau's computer analysis of the Paran antenna array parameters confirm[ed] the radiation values proposed by Valley's consultant." Mass Media Bureau's Comments, filed February 9, 1983, at 3. The Bureau added, however, that because the system was so new, certain conditions should be placed on Valley's construction permit in the event its application was granted. *Id.* One of the former applicants, the Navajo Nation, also supported Valley's motion. The motion, however, was opposed by Indian Women.

10. By *Memorandum Opinion and Order*, FCC 83M-935, *supra*, the ALJ granted the motion for summary decision subject to conditions requiring Valley to submit a proof of performance prior to the authorization of program tests showing that its antenna will operate as proposed. In its exceptions, Indian Women contends that summary decision was inappropriate and that a remand of the proceeding would be necessary before Valley's application could be granted. It argues that Section 73.189(b)(7) of the Commission's Rules, 47 CFR 73.189(b)(7), requires an applicant proposing an unconventional antenna to demonstrate through actual measurements rather than theoretical calculations, as was done here, that the design will produce the antenna efficiency required by the rule.

11. Although we have some qualms concerning the propriety of the summary decision in this proceeding in light of Section 73.189(b)(7), which, as pointed out by Indian Women, appears to require the submission of a field strength survey and related data, a remand directing Valley to construct a model system and/or conduct the field survey at this juncture would serve no useful purpose. First, we have little more than Indian Women's speculation and conjecture that the Valley antenna system will not

operate as proposed. Although the antenna is new to the United States, it has been used in Europe and to some extent at United States military installations. *Memorandum Opinion and Order*, FCC 83M-935, *supra*, at 2. Moreover, the Mass Media Bureau, in its comments in support of the motion for summary decision, represented that its computer analysis confirmed the radiation values proposed by Valley's engineer. Second, the ALJ placed specific conditions on Valley to submit a complete proof of performance concerning the antenna's effectiveness before program tests could be authorized to ensure that the antenna would in actuality operate as proposed, and, in any event, as pointed out by Indian Women in its brief, Valley asserted at page 15 of its engineering exhibit exchanged January 3, 1983 that it "will immediately obtain a new site, and erect a standard height tower for the 660 kHz frequency" in the event the antenna cannot be made to operate as proposed. Indian Womans Br. at 7. *See Son Broadcasting, Inc.*, 92 FCC 2d 450, 52 RR 2d 1017 (Rev. Bd. 1982) (approval of qualifying post-hearing engineering amendment by remaining applicant suggested in Board's affirmance of summary decision based on amendment). More important, however, were we to remand this proceeding for Valley to take actual measurements and discover that its antenna failed to operate as anticipated, Valley would be entitled under our precedents to amend its application, and moot the issue. *See Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 54 RR 2d 989 (Rev. Bd. 1983) (subsequent history omitted). That case involved an applicant's disqualification by the ALJ on a main studio location issue (Rule 73.1125) after the ALJ had disallowed a petition for leave to amend promptly filed following denial of the applicant's motion for summary decision based on a waiver of the main studio location rule. The Board, in overturning the ALJ, noted that the applicant had been duly diligent in seeking to amend and that its amendment would not have caused disruption to the hearing process because the first hearing session was not held until over five months after the amendment was filed. 95 FCC 2d at 716, 54 RR 2d at 993. The same factors are present here. First, Valley showed due diligence in timely submitting all of the clarifying information called for by the designation order. Second, Valley filed its motion for summary decision nearly five months prior to hearing and could have promptly filed an amendment had its motion for summary decision been denied and the applicant placed on notice that actual measurements were required. A field survey establishing a failure of the antenna's effectiveness and a

subsequent corrective amendment at that early date would not have caused a disruption of the hearing and under *Old Time Religion Hour, Inc., supra*, would have met the good cause standard. A contrary result cannot now ensue merely because the ALJ granted the motion for summary decision. Having found that Valley has established its basic qualifications to be a Commission licensee, we turn to the Section 307(b) issue.[3]

12. *Section 307(b) Issue.* Because Valley and Indian Women propose to serve different communities, the Commission designated an issue, pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 307(b), to determine which of the proposals would best provide a fair, efficient, and equitable distribution of radio service. *Memorandum Opinion and Order*, 47 Fed. Reg. 34621, *supra*. If a determination can be made under the statutory mandate that the radio needs of one community are favored over the other community or communities, only applicants specifying the favored community are given further consideration under the standard comparative issue. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 808, 51 RR 2d 409, 415 (Rev. Bd. 1982) (subsequent history omitted). As correctly observed by the ALJ, the "fair, efficient, and equitable" Section 307(b) standard "looks to the relative needs of the respective proposed service areas for 'a reception service' (no concern for a specific point of origin) and to the relative needs of the proposed communities of license for a new 'transmission service' (community of license is the point of origin)." *I.D.*, Conclusions, para. 1, citing *Kent Ravenna Broadcasting Co.*, 44 FCC 2603, 22 RR 605 (Comm'n 1961). The transmission criterion, as further pointed out by the ALJ, measures the relative needs in terms of the number of facilities and respective population in each of the competing communities. *WHW Enterprises, Inc., supra*, at 811, 51 RR 2d at 417. The reception criterion, on the other hand, relates to the number of program choices available to listeners but is significant only where the proposed service area is underserved. *See Kaldor Communications, Inc.*, 98 FCC 2d 292, 294, 56 RR 2d 137, 140

[3] One additional matter before us relates to the ALJ's denial of a rule waiver to permit Indian Women to use nighttime power of 5 kW, which is in excess of the Commission's Rules (Section 73.21(a)(2)(ii)(c)). In denying Indian Women's request for a rule waiver, the ALJ concluded that the applicant had satisfied the test set forth in *Kaye-Smith Enterprises*, 52 RR 2d 1685 (Comm'n 1983), but held that the case had no precedential significance because it was not reported in the FCC Reports. Indian Women correctly points out, however, that Section 0.445(e) of the Commission's Rules, provides that documents published in Pike and Fischer Radio Regulations may be relied upon as precedent. Indian Women's request for waiver is granted.

(Rev. Bd. 1984). In the instant case, Mount Vernon, Valley's proposed community of license, has a population of 13,009 and, in addition to Valley's current daytime only AM facility, has only one other fulltime commercial station licensed to it. *I.D.*, Findings, para. 6. Valley's proposed fulltime operation would provide Mount Vernon with its second nighttime commercial broadcast service. *Id.*, at para. 7. Its daytime contour will cover 1,025,515 persons overall and provide a first, second, third, fourth, and fifth daytime service to 126, 2,537, 2,455, 3,452, and 2,731 persons, respectively. *Id.* Portland, Indian Women's specified community of license, has a population of 366,383 and has nineteen commercial aural broadcast facilities assigned to it. *Id.*, at para. 8 and n. 8. Indian Women's proposal would provide a daytime service to 2,335,856 persons overall and a first and second aural service to 23 persons and 1,356 persons, respectively. *Id.*, at para. 9.

13. The *I.D.* awarded preferences to Valley for both its transmission and reception advantages and a dispositive preference overall, and rejected a claim by Indian Women that its minority ownership was entitled to consideration under the Section 307(b) issue. Indian Women now takes four exceptions to the ALJ's analysis under this issue. First, it contends that the ALJ incorrectly awarded Valley a preference for bringing a new service to more people when his findings demonstrated that Indian Women would serve twice as many people daytime and twenty times as many people at night. Second, Indian Women argues that the ALJ erred in concluding that Valley would serve slightly greater underserved populations because the efficiency of Valley's PARAN antenna has not been demonstrated. Next, Indian Valley charges that the ALJ erroneously ignored the existence of a non-commercial FM station assigned to Mount Vernon, arguing that when that station is weighed against the nineteen aural transmission facilities available for the much larger community of Portland, the Section 307(b) transmission distinction is of less decisional significance than the substantial reception advantage to which it claims Indian Women is entitled. And last, it alleges that the ALJ erroneously refused to consider Indian Women's minority ownership in his Section 307(b) evaluation. In this latter regard, Indian Women argues that it is manifest that *Clear Channel AM Broadcasting*, 78 FCC 2d 1345, 47 RR 2d 1099 (Comm'n 1980), the Report and Order making available the channel at issue, introduced the factor of minority ownership into Section 307(b) analyses in cases involving one of the former clear channels.

14. We conclude that Valley is entitled to a dispositive Section 307(b) transmission preference for providing Mount Vernon with its first competitive nighttime local outlet. The Commission has emphasized that the provision of a second local transmission service is an important public interest consideration. *See Ruarch Associates*, 101 FCC 2d 1358, 58 RR 2d 1642 (Comm'n 1985) (first transmission service for community of 752 population failed to outweigh 2nd transmission service for larger community); *see also Wilmer E. Huffman*, 32 FCC 1, 3 (1962) (second competitive daytime station along with other factors considered "crucial matters for evaluation"). And, in *Babcom, Inc.*, 27 FCC 2d 437, 21 RR 2d 6 (Rev. Bd. 1971), *set aside on other grounds*, 31 FCC 2d 425, 22 RR 2d 828 (Comm'n 1971), the Board found that the need of a community (pop. 2592) for a second local transmission service outweighed the need of a larger community (pop. 120,096) for a fifth standard and ninth aural broadcast facility. *See also WHW Enterprises, Inc., supra* (need for first competitive daytime outlet and first nighttime local outlet outweighed larger community's need for sixth aural service). Indian Women's contention that the ALJ improperly ignored the noncommercial Mount Vernon station is of little or no significance. At the outset, the ALJ rejected the inclusion of this information because it was proffered via an official notice request after the record was closed and was not the kind of fact beyond reasonable controversy. He added, however, that even if the official notice was proper, consideration of non-commercial stations for Section 307(b) purposes it not relevant, citing *Kaldor Communications, Inc., supra*, at 294 n. 4, 56 RR 2d at 139 n. 4. Even however, if Indian Women was correct that noncommercial stations must be included in Section 307(b) evaluations, the weight of the particular facility involved here would be *de minimis* because, as Valley points out, it is only an 18-watt station which apparently operates only parttime during the day. Valley Reply Br. at 3. Furthermore, if non-commercial stations were included in the Section 307(b) analysis, Indian Women's Section 307(b) posture would further deteriorate because Portland has assigned to it four non-commercial stations that have not been weighed into the Section 307(b) analysis. *I.D.*, Findings, para. 8. Indian Women's further argument that the transmission disparity is outweighed by the overall population superiority it enjoys (2,335,856 pop. vs. 1,025,515 pop.) is erroneous because except for the underserved populations noted in paragraph 12 of our Decision, *supra*, all of the population in Indian Women's service area receives at least

five reception services. *See Archilla-Marcocci Spanish Radio Co.*, FCC 86-271, released May 30, 1986, at n. 2 ("[w]hen an area already receives 5 or more services, no preference is warranted under Section 307(b) for reception service").

15. Indian Women's claim that the ALJ erred in concluding that Valley would reach more people than Indian Women is of minor significance. It is obvious from a review of the *I.D.* that the conclusion relates to the number of underserved populations, on which Valley indeed enjoys a superiority, rather than overall population. *See I.D.*, Conclusions, at para. 5. In any event, we agree with Indian Women that the underserved population superiority of Valley should not provide a Section 307(b) reception preference for either applicant in light of our decision in para. 11, *supra*. Finally, we conclude that the ALJ properly refused to weigh Indian Women's minority ownership into the Section 307(b) analysis. We have previously held that:

> [A]lthough the . . . Commission attaches high importance to fostering the participation of under-represented minorities in the ownership and operation of broadcast stations, the absence of any language in [Clear Channel AM Broadcasting, *supra*] explicitly altering the traditional Section 307(b) priorities is sufficient to persuade us that a major policy revision concerning Section 307(b) was not contemplated therein. (*See FCC v. Allentown Broadcasting* [349 U.S. 358 (1955)] enjoining the Commission to determine which community has the greater need for additional services and then to determine which applicant can best serve the need).

Archilla-Marcocci Spanish Radio Co., 101 FCC 2d 522, 528, 58 RR 2d 967, 971 (Rev. Bd. 1985), *rev. denied*, FCC 86-271, *supra*.

16. *Summation.* All decisionally significant exceptions have been considered. The site intervention, lack of candor, and antenna effectiveness issues have been resolved favorably to Valley. In addition, Valley has been awarded a dispositive Section 307(b) transmission preference for providing Mount Vernon with its first competitive nighttime local outlet, thus obviating consideration of the standard comparative issue. *See Kaldor Communications, Inc., supra*. A grant of Valley's application will therefore best serve the public interest, convenience, and necessity.

17. ACCORDINGLY, IT IS ORDERED, That the motion for leave to amend filed March 5, 1986 by Northwest Indian Women Broadcasters, Inc. IS GRANTED, and the amendment IS ACCEPTED; and

18. IT IS FURTHER ORDERED, That the application of Valley Broadcasters, Inc. (File No. BP-801112AB) for authority to modify the operation of KAPS, Mount Vernon, Washington IS

GRANTED, and the application of Northwest Indian Women Broadcasters, Inc. (File No. BP-801113AD) IS DENIED.

19. IT IS FURTHER ORDERED, That the grant of Valley Broadcasters, Inc. IS CONDITIONED as follows:

(1) Before program tests are authorized, permittee shall submit a complete proof of performance to establish that the horizontal pattern is essentially circular and that the minimum efficiency of 175 mV/m for one kilowatt required by Section 73.189(b)(2)(ii) and 73.189(b)(7) is obtained. The proof shall include at least eight approximately equally-spaced radials with sufficient closein points such that the inverse distant fields can be clearly established.

(2) The permittee will perform vertical current distribution measurements on each tower of the Paran antenna to assure that the nighttime skywave radiation will be as proposed in the Valley application.

(3) Permittee shall submit a log of adjustments performed to achieve final operation of the antenna.

(4) Permittee shall submit field strength measurements along 0 degrees, 90 degrees, 180 degrees and 270 degrees bearing with only one of the four towers radiating.

FEDERAL COMMUNICATIONS COMMISSION

ERIC T. ESBENSEN, *Member, Review Board*

FCC 86D-9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
VALLEY BROADCASTERS, INC. KAPS, Mount Vernon, Washington	BC DOCKET NO. 82-436 File No. BP-801112AB
NORTHWEST INDIAN WOMEN BROADCASTERS, INC. Portland, Oregon	BC DOCKET NO. 82-437 File No. BP-801113AD
For Construction Permit	

Appearances

Richard J. Bodorff, Ann K. Ford and *Robert L. Heald* on behalf of Valley Broadcasters, Inc.; *Chester F. Naumowicz* on behalf of Northwest Indian Women Broadcasters, Inc. and *Brian Kilbane, Arthur I. Steinberg, Joseph Belisle* and *Lawrence Bernstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

Issued: February 7, 1986; Released: February 13, 1986

Preliminary Statement

1. By *Memorandum Opinion and Order* released August 3, 1982, the Commission designated six conflicting applications for construction permits on 660 kHz for consolidated hearing. Through the withdrawal of three applications and the grant of another, the proceeding has now been narrowed to the two above-captioned applications.[1]

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[1] Oil Shale Broadcasting Company (KWSR), Rifle, Colorado; Family Broadcasting System (KFLR), Phoenix, Arizona and KMO, Inc., Fife, Washington, all withdrew. The Navajo Nation, Window Rock, Arizona application was sepa-

2. The original issues, as modified by the foregoing events and other prehearing actions evolved into the following issues for determination by Initial Decision:[2]

(5) To determine the areas and populations which would receive primary service from each proposal, and the availability of other primary aural service to such areas and populations;

(6) To determine in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service;

(7) To determine, in the event it be concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the overlapping proposals would, on a comparative basis, best serve the public interest; and

(8) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. In filings dated September 9, 1982 and October 14, 1982, Northwest Indian Women attempted a post-designation Petition for Leave to Amend to go to a directional antenna system at its Oaks Park site. This was rejected on January 7, 1983 (FCC 83M-57), but on March 17, 1983, the identical proposal was again submitted and was pending at the time Northwest Indian Women made a claim that it had lost its Oaks Park site, followed on May 23, 1983 by a third directional antenna proposal at a new site. This Petition to Amend; i.e., the third proposed directional antenna, was considered and denied by the Presiding Judge at a hearing conference held on June 9, 1983. This was followed by an *Order* released June 17, 1983 (FCC 83M-1983) dismissing Northwest Indian Women's application after that applicant failed to present any engineering evidence relative to its proposal at the hearing session held on June 13, 1983. This action was appealed to the Review Board which, by *Memorandum Opinion and Order* released September 16, 1983 (FCC 83R-69) reversed the judgment, granted the amendment and stated that " . . . it is significant here

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rated and granted by *Order* released August 11, 1983.

[2] Special Issues 1, 3 and 4 were rendered moot by the withdrawals and Issue 2 as to Valley Broadcasters, Inc.'s (Valley) antenna proposal was resolved by summary decision in its favor, released March 21, 1983. Northwest Indian Women Broadcasters, Inc. (Northwest Indian Women) attempted to meet the issue which had been added on December 8, 1982, as to the feasibility of its ground system, by an amendment filed February 1, 1983. However, a Motion for Summary Decision was denied by *Memorandum Opinion and Order* released May 14, 1983. That issue became moot when Northwest Indian Women abandoned its Oaks Park site.

in considering these elements that the [Indian Women] loss of site occurred due to the intercession of a competing applicant [Valley]."[3] Valley petitioned the Review Board for reconsideration contending that such conclusion was not supported by the evidence. The Review Board denied the requested reconsideration and indicated that the facts concerning Northwest Indian Women's loss of antenna site, and Valley's actions concerning such loss of site could be taken up in the course of the proceeding (*Memorandum Opinion and Order* released September 16, 1983, FCC 83R-69).

4. Thereafter, in light of the Review Board's Decision, the Presiding Judge enlarged the issues to include the following by *Order* released December 14, 1983 (FCC 83M-4672):

(a) To determine the facts and circumstances relating to and surrounding the investigation of Northwest Indian Women's proposed transmitter site by Valley;

(b) To determine whether the conduct of such investigation constituted an attempt to deprive Northwest Indian Women of its transmitter site, and, if so, what effect such conduct has upon the qualifications of Valley to be a licensee of the Commission; and

(c) To determine whether Valley has displayed a lack of candor by knowingly submitting to the Commission misleadingly incomplete documents relating to the availability of Northwest Indian Women's proposed transmitter site, and, if so, what effect such conduct has upon the qualifications of Valley to be a licensee of the Commission.

5. Finally, at a hearing session on May 25, 1984, the Presiding Judge orally added the following issue:

To determine whether facts and circumstances exist which would warrant waiver of Rule 73.21(c)(2)(ii)(c) in favor of Northwest Indian Women.

Proposed Findings of Fact and Conclusions of Law were filed by both parties applicant respectively in June, 1984 and supplemented in February, 1985.

Findings of Fact

Areas and Populations and Section 307(b) Issue

6. Mount Vernon, Washington has a population of 13,009 persons (Valley Exhibit 1-R). In addition to Valley's Station KAPS, one other commercial AM station is assigned to Mount Vernon, Station KBAC, which operates full-time (Valley Exhibit

[3] See paragraph 5 of the Review Board's *Memorandum Opinion and Order.*

2). Northwest Indian Women requests that post-hearing official notice be taken of educational station KSVR-FM which is also assigned to and operating in Mount Vernon (para. 26 of Northwest Indian Women's Findings).[4]

7. Valley, operating as proposed, would provide a second full-time service to Mount Vernon (Valley Exhibits 1 and 2). Valley's daytime contour would cover 1,025,515 persons residing in 11,692 square miles (Valley Exhibit 2, p. 18). Valley, operating as proposed, would also provide a daytime primary service (2.0 mV/m) to Anacortes and Island County, for the first time (Valley Exhibits 1 and 2). The proposal will provide a first daytime service to 63 square miles and 126 people; a second service to 558 square miles and 2,537 people; a third service to 518 square miles and 2,455 people; a fourth service to 1,116 square miles and 3,452 people and a fifth service to 1,137 square miles and 2,731 people (Valley Exhibit 2, pp. 1 and 18).[5]

8. Portland, Oregon has a population of 366,383 persons[6] (Northwest Indian Women Exhibit 1, p. 1). As the central city of an SMSA containing a population of 1,242,544 persons, it is a highly diverse community. It is the largest distribution center in the Pacific Northwest and is served by all forms of transportation. It contains a plethora of business, sports, educational and cultural entities (Northwest Indian Women Exhibit 1). There are 11 AM stations assigned to Portland, five of which are daytime-only and 13 FM stations, four of which are educational[7] (Valley Exhibit 3-R). Thus, Northwest Indian Women would bring

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[4] Valley, in Footnote 5 of its Proposed Findings (p. 17), acknowledges that there is an 18 watt non-commercial FM station at Mount Vernon and adds that in Portland, Oregon where Northwest Indian Women would construct, there are five such non-commercial facilities. Northwest Indian Women has made a number of requests for official notice in its Proposed Findings. Such requests came after the hearing was concluded. Such post-hearing requests add nothing but confusion to the record. Such requests must be made while the hearing record is still open so that other parties may deal with the evidence while the record is still open. The problems created by such official notice requests will be considered *infra.* in the Conclusions of Law.

[5] Northwest Indian Women questions all of these figures because Valley did not take into account the service provided by non-commercial station KSVR-FM. This demonstrates the problems created with post-hearing requests for official notice. If Northwest Indian Women believed Valley's figures were wrong, it should have raised this matter at the hearing.

[6] Post-hearing Northwest Indian Women requests that official notice be taken that Portland is the nation's thirty-sixth largest city (para. 29 of Proposed Findings). This information was contained in Northwest Indian Women's Exhibit 3 which was not received into evidence.

[7] The question of non-commercial stations will be considered in the Conclusions.

Portland its twenty-fifth aural facility and its twentieth nighttime aural facility.[8]

9. Daytime, Northwest Indian Women would include a population of 2,335,856 persons residing in 36,650 square miles within its 0.5 mV/m contour, and 946,637 persons residing in 747 square miles would be included within its nighttime interference-free contour (Northwest Indian Women Exhibit 4). A first aural service would be provided to 23 persons residing in an area of 65 square miles; a second such service to 1,356 persons residing in 702 square miles. Fourth and fifth services are represented by Northwest Indian Women to be statistically insignificant. At night, at least five aural services are available throughout Northwest Indian Women's interference-free contour (Northwest Indian Women Exhibit 4).

The Contingent Comparative Issue

10. Valley is the licensee of Station KAPS-AM which operates daytime only at Mount Vernon, Washington. Its instant application is to modify the facilities of KAPS so that its operation will be full-time with increased power. Mr. James J. Keane is the 40% shareholder of Valley (Joint Exhibit 5, p. 2) and he is President, Director and General Manager of Valley. He presently devotes full-time to the operation of KAPS and will continue to do so in the future (Valley Exhibit 1-R).

11. Mr. Keane resides in Burlington, Washington, about 2 1/2 miles from Mount Vernon and this is within the service area of Valley's proposed operation (Valley Exhibit 1; Tr. 62; Letter of May 30, 1984 from Richard Bodorff to Presiding Judge and Joint Exhibit 5, p. 2). Mr. Keane began his career in broadcasting in 1971 as a salesman for Station KREM, Spokane, Washington. He remained in sales at Station KREM until 1978 when he joined Station KAPS.[9] (Valley Exhibit 1-R).

12. Mr. Keane is a member of the Chamber of Commerce in Mount Vernon as well as in Burlington and Sedro Wooley. He has served as head of fundraising for the Rotary, aided the United Way and acted as Vice-President and Director of the Secret

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[8] If the four educational non-commercial stations are deducted, Northwest Indian Women would provide a twentieth commercial aural service to Portland and its fourth 50 kW station (Valley Exhibit 3). The city also has five VHF stations and two major daily newspapers (Northwest Indian Women Exhibit 1, pp. 6 and 7).

[9] The record does not show when Mr. Keane became General Manager of KAPS.

Harbor School for emotionally disturbed teenagers[10] (Valley Exhibit 1-R).

13. Northwest Indian Women is wholly-owned by Elizabeth David, an American Indian, who is the sole director and officer of Northwest Indian Women. Neither Northwest Indian Women nor Ms. David have any interest in any media of mass communications (Northwest Indian Women Exhibit 2).

14. In the event of a grant, Ms. David will move to Portland and assume the position of General Manager of Northwest Indian Women's proposed station where she plans to serve full-time on the basis of 40 hours per week. In 1969-1970, Ms. David served as a part-time announcer on Station KTAO-FM, Los Gatos, California (Northwest Indian Women Exhibit 2).

The Section 73.21(a)(2)(ii)(c) Issue

15. The Section 73.21 issue was added because Northwest Indian Women, from its presently-proposed antenna site[11] proposed a nighttime power of 5 kW, which is in excess of the 1 kW maximum power permitted for a Class II-B station as proposed by Northwest Indian Women. This amendment was accepted by the Review Board in its *Memorandum Opinion and Order* released September 16, 1983 wherein it was noted in paragraph 4 and footnote 5 that the Northwest Indian Women 10 kW nighttime proposal would require a waiver of Section 73.21(a)(2)(ii)(c) of the Commission's Rules.

16. To resolve the waiver issue, Northwest Indian Women offered and there was received in evidence, Northwest Indian Women's Waiver Exhibit 1. This exhibit was sponsored by Leonard Kesselman and cross-examination was not requested of Mr. Kesselman (Tr. 319). Mr. Kesselman states in his exhibit that he is an attorney-at-law and is the corporate counsel for Northwest Indian Women and has served in that capacity since prior to the date the application was filed on November 13, 1980.

17. The scope of the waiver issue is limited. On August 9, 1984, Northwest Indian Women filed a Motion for Summary Decision of the Section 73.21 issue. By *Memorandum Opinion and Order* released September 25, 1984 (FCC 84M-4076), the summary decision requested by Northwest Indian Women was granted in part. The *Memorandum Opinion and Order* granted the summary

[10] The record does not disclose in what communities these organizations are located. Further, the record is silent as to any other media interests of Mr. Keane.

[11] This site is completely removed from the Oaks Park site.

decision of Section 73.21 of the Rules insofar as Northwest Indian Women had established its need for 5 kW nighttime power from the proposed antenna site and that such power will not preclude other assignments of the frequency. Summary decision was not granted with respect to Northwest Indian Women's showing that there was no site available which would comply with the 1 kW nighttime power limitation as set out in Section 73.21(a)(2)(ii)(c) of the Rules. Thus, the hearing is restricted to evidence solely to the question of the lack of any suitable site which would comply with the Rules.

18. Mr. Kesselman's statement received as Northwest Indian Women Exhibit 1 relates how Mr. Kesselman was advised by Northwest Indian Women's engineer of the geographic area in which an antenna site would have to be located to achieve compliance with the Rules and that this information was provided to a real estate firm, which is not named. The real estate firm was instructed to locate a suitable site which conformed to Northwest Indian Women's requirements and was within the boundaries as indicated in the area delineated by the Northwest Indian Women engineer. Mr. Kesselman states that the real estate firm did identify approximately 10 potential sites within the delineated search area. However, each of these possible sites was discarded because it was (1) "not available" or "physically suitable", (2) would not comply with the Commission's Rules or the Presiding Judge's conditions or (3) was "not for sale or lease at a price or upon terms consistent with use as a proposed transmitter site" by Northwest Indian Women (Northwest Indian Women Exhibit 1, pp. 4 and 5).

19. Mr. Kesselman then decided that the area of possible transmitter location would have to be expanded to an area from which Portland could be served by a power higher than 1 kW nighttime. The area searched was thus expanded and Northwest Indian Women's present site is located within this area (Northwest Indian Women Waiver Exhibit 1, p. 7).

Investigation Issues

20. After the Northwest Indian Women antenna efficiency issue had been added by *Memorandum Opinion and Order* released December 8, 1982, Northwest Indian Women amended its application in an effort to eliminate the added issue. In connection with the amendment, Ms. David, 100% owner of Northwest Indian Women, attached a sworn statement which represented that Northwest Indian Women had permission to use the properties of

Pacific Gas and Electric (PG&E) and the OYC (Oregon Yacht Club) for extension of the KLIQ existing ground system. Ms. David admits she executed such an affidavit and Mr. Keane saw the affidavit and went to Portland, Oregon to check out the statement (Joint Exhibit 5, pp. 4-5; Valley Exhibit 4, pp. 8-10). Mr. Keane visited Portland on March 8, 1983 where he interviewed David Larsen of PG&E and learned that PG&E had given no permission to use its land for extension of the KLIQ ground system and Mr. Larsen provided a sworn statement to that effect. This statement (Attachment 1A, Joint Exhibit 6) was superceded by one dated March 23, 1983 (Attachment 2A, Joint Exhibit 6). Since both of these statements of Mr. Larsen's form a basis for the lack of candor issue, each of these statements is set out in full. The statements are as follows:

March 7, 1983

Jim Keane
KATS Radio
Mt Vernon WA 98273

Dear Mr. Keane:

Subject: Oak Crossing Property

This is in response to our telephone conversation concerning property bordering the Oaks Park Amusement area, which is owned by Portland General Electric Company and referred to by our Company as Oaks Crossing, as we have a high-voltage transmission line crossing of the Willamette River in this area.

In response to your question, the attached letter, obviously meant for Portland General Electric Company to sign and send to Mrs. Elizabeth David of the Northwest Indian Women Broadcasters, arrived in our office with no explanation. We sent her the attached letter requesting more information concerning her plans.

In further checking on the Oaks Crossing area, Portland General Electric Company has presently under option to Tamarack Communications, a site south and east of Stafford and Rosemont Roads in Clackamas County, Oregon, for use as a signal tower by Tamarack Communications. At present, they are located in the Oaks Park Amusement area. It would appear that Mrs. David is planning to replace the Tamarack Communications antenna with a higher-wattage signal.

As a direct statement on our involvement with Mrs. David, we have had no other communication, and have given no permission for use of our land bordering the Oaks Amusement Park.

Sincerely,

David N. Larsen,
Manager, Property Department

March 23, 1983

Jim Keane
KAPS Radio
Box 70
Mt. Vernon WA 98273

Dear Mr. Keane:

With regard to our conversations concerning the property bordering the Oaks Amusement Park and Oregon Yacht Club areas owned by Portland General Electric Company (PGE), proposed to be used by Northwest Indian Women Broadcasters Inc. for installation of ground radials for a new radio station, I have never talked with Elizabeth David or anyone representing her or that company.

We have given no permission to anyone to make such use of our land bordering the Oaks Amusement Park or Oregon Yacht Club.

David N. Larsen, Manager
Property Department

The testimony at this point is in conflict. Mr. Keane states that he requested Mr. Larsen to prepare the second sworn statement because the first one included extraneous materials concerning Tamarack Communications, licensee of KLIQ. Thus, Mr. Keane requested Mr. Larsen to provide a statement confined to the question of whether or not permission had been granted by PG&E to extend the KLIQ ground system into land owned by PG&E (Joint Exhibit 5, pp. 25, 36-38; Joint Exhibit 7, pp. 30, 33, 37-39, 42-45).

21. Mr. Larsen also showed Mr. Keane a letter which had been made up by someone for PG&E to sign and return to Elizabeth David, P.O. Box 11536, Piedmont, California. If executed by PG&E,[12] the letter would have given Northwest Indian Women permission to use PG&E property for its radials (Joint Exhibit 6, Attachment 4). The letter, dated February 1, turned up at PG&E on February 18, 1983, in a blank envelope without a transmittal letter. Mr. Larsen was unable to find anyone in his department with knowledge of the letter and did not know what site on PG&E property was involved and he so informed Ms. David by letter on February 24, 1983 (Joint Exhibit 6, Attachment 3). Mr.

[12] The letter was never executed.

Larsen was unaware at that time that Mr. Leonard Kesselman had contacted his subordinate, Mr. John Fishback, by telephone but the testimony is also in conflict as to whether Mr. Kesselman identified himself. It appears, according to Mr. Fishback, that he never connected the February 1 draft letter with Mr. Kesselman or Northwest Indian Women since Mr. Kesselman, according to Mr. Fishback, did not identify himself over the telephone as representing Northwest Indian Women and there was no mention of the name Elizabeth David. The only recollection of Mr. Fishback is that Mr. Kesselman made reference to his ex-wife (unnamed) who was involved in some type of broadcast system (Joint Exhibit 6, p. 4). There were possibly three or four telephone contacts between Fishback and Kesselman. Kesselman claims he did properly identify himself and that Mr. Fishback indicated to him that the property could be used and Fishback gave permission (Valley Exhibit 5, pp. 11, 12, 14 and 16). PG&E officials—Larsen and Fishback—contradict this. According to PG&E, Kesselman at best requested that if the KLIQ ground system had to be extended would it be possible to use PG&E land. In the Larsen letter to Ms. David, it was stated that he didn't "feel there would be a problem" but Larsen terms this a public relations type of remark that he would have made to anyone making such inquiry. However, PG&E felt their position was clear that before any consideration could be given the Northwest Indian Women request, detailed information on the use of PG&E land would be required from Northwest Indian Women and this would have to be cleared by both PG&E's legal and engineering departments before any assurance could be given. PG&E was concerned about effects on future transportation potentials and in relation to other uses such as PG&E other uses (Joint Exhibit 7, pp. 20-24). In summary, it is PG&E's position that it has never given permission to Northwest Indian Women and it is not actively considering the matter since Northwest Indian Women never provided the required additional information (Joint Exhibit 6, pp. 13, 14, 22, 23, 35 and 36 and Valley Exhibit 5, p. 18). Mr. Kesselman disputes this. He claims that he did provide grid[13] information to Mr. Fishback by telephone and that the PG&E consent was based upon such information. According to Mr. Kesselman, Mr. Fishback did send him a map of the PG&E property and Kesselman then telephoned Fishback and with the aid of the PG&E map in front of him, claims he described the

[13] Terms such as grid, ground system and radials all refer to the same thing; i.e., the buried wires necessary for the ground system.

location of the proposed grid on the PG&E property (Valley Exhibit 5, p. 17). Mr. Kesselman admits that other than the phone call to Fishback, he never provided more engineering information to PG&E. Kesselman states this was never necessary as he was not seeking PG&E final approval. Mr. Kesselman also claims he had Mr. Fishback's oral statement over the phone[14] that the draft letter sent in the blank envelope to PG&E would be signed. However, the letter was never signed. Rather, Larsen's letter to Ms. David made clear that further information would be required and that Mr. Larsen may have told Kesselman that Mr. Fishback could not grant such consent on behalf of PG&E (Valley Exhibit 5, p. 18). Kesselman knew Fishback had no authority to approve anything (Joint Exhibit 6, pp. 13, 14, 22, 23, 35 and 36).

22. Ms. David did not prepare the February 1 letter (Mr. Kesselman did so; Valley Exhibit 5, p. 10) and she does not remember sending anything. She had no conversations or meetings with PG&E. When she received the letter from PG&E, she did nothing with it except mail it to Kesselman. Ms. David was unable to answer any questions as to the use of the PG&E property saying "That's too big a question for me". She left everything to Kesselman (Valley Exhibit 4, pp. 4, 5, 7, 9, 11).

23. It is Mr. Keane's position that he did not include reference to the David-Larsen letter (see para. 20, *supra.*, March 7, 1983 letter) because his purpose in the Valley Opposition to Northwest Indian Women's Petition for Leave to Amend to the directional antenna system was to directly refute the claim of permission. Ms. David had sworn on January 28, 1983, that she had such express and explicit approval, whereas the self-addressed blind[15] letter, which the record establishes was sent by Mr. Kesselman was dated February 1 and did not surface at PG&E until February 18, 1983. Thus, Mr. Keane claims such facts lead him to believe that Ms. David could not have had the permission as claimed in her affidavit and he had no intent to deceive anyone. Mr. Keane was unaware of Kesselman's contacts with Fishback until sometime in April, 1983 (Joint Exhibit 5, p. 57).

24. Also, on March 8, 1983, Mr. Keane interviewed Mr. Robert Bollinger, owner of Oaks Park and the present location of the KLIQ transmitter, antenna tower and associated ground system. Mr. Keane wanted to ascertain whether Mr. Bollinger had granted Northwest Indian Women permission to extend the KLIQ ground system through the Oaks Park property to the PG&E and OYC

[14] All contacts between Fishback and Kesselman were by phone.
[15] Blind is used here to denote that there ws no transmittal letter.

premises. Ms. David had been silent about this in her sworn statement of January 28. 1983. Mr. Keane had been advised by his consulting engineer, George Frese, that Bollinger's permission would be essential if the KLIQ radials were to be extended (Joint Exhibit 5, p. 61). Bollinger would not allow any excavation or construction to such ends, and, if anyone attempted such a thing, he would stop it. Neither would he give permission for a 50 kW station at Oaks Park (Joint Exhibit 5, pp. 14–16, 19). The information obtained by Mr. Keane, during his meeting with Mr. Bollinger, was used by Mr. Keane in an affidavit on the subject accompanying Valley's Opposition to Northwest Indian Women's renewed directional antenna amendment. Mr. Bollinger's deposition confirms that such advice was given to Mr. Keane (Joint Exhibit 4, pp. 26, 29 and 30).

25. At this point, it is necessary to deal with an assumption or belief held by Mr. Keane that the existing KLIQ ground system may not extend to the Oaks Park property line which would have a common boundary with the property of PG&E and the OYC. This assumes importance since it is another claimed area of misrepresentation by Northwest Indian Women. It will be recalled that during the Keane-Bollinger meeting reference was made to the possibility of excavation on the Oaks Park land in order to connect the existing radials to extensions into the land of PG&E and OYC. It is Northwest Indian Women's position that Valley knew the radials did extend to the Oaks Park property line and thus, there would be no excavation required on Oaks Park property. The information used by Mr. Keane was based upon a report of attempts to measure the KLIQ existing radials on January 5, 1982. On this date, Mr. Dwayne Lee, who works with George Frese, Valley's consulting engineer and Mr. McClanathan went to the KLIQ site with a field meter and tried to trace the KLIQ ground system as it then existed (Joint Exhibit 2, p. 15). Also measured on that date were currents created by the KLIQ 1 kW existing ground system on some of the vertical metal structures at the site. They found current from the KLIQ operation in a lamppost and a partially disassembled structure called a "Mouse Ride".[16] In Joint Exhibit 2, p. 7, Mr. McClanathan testified that "As the results were somewhat inclusive but, generally, it showed that the ground system did exist out to some of the dimensions that were claimed by Indian Women. That was January 5, 1982." At Joint Exhibit 2, p. 14, the January 5,

[16] This is a roller coaster ride for small children.

1982 visit was further discussed. The problem experienced by Mr. McClanathan and Mr. Lee was that in trying to trace the KLIQ ground system, the current from KLIQ got into the vertical steel and buildings around Oaks Park which interfered with the readings on the field meter "and we couldn't really get definitive measurements on the ground system strength. That's why earlier I mentioned it was somewhat inclusive, the length of the ground wire." The final reference to the ground radials going right up to the Oaks Park property line at any point is in Joint Exhibit 2, p. 23. Here, Mr. McClanathan expressed the view that "the radials might not be there. But as I say, they could be there but just so deep we couldn't observe them with the instrument we had." This was the report Mr. McClanathan gave to Mr. Frese and and Mr. Frese confided with Mr. Keane "just about everything I knew about the case" (Joint Exhibit 8, p. 17).[17]

26. During Mr. Keane's March, 1983 visit to Portland, he also contacted Mr. Taylor of the OYC to find out if the OYC had given Northwest Indian Women permission to extend the KLIQ radials onto the club's property. It appears that Mr. Kesselman had negotiated with Mr. Taylor by telephone and had obtained an option to use the OYC land for the execution of tower and associated ground system for a 1,000-watt nighttime operation (Joint Exhibit 1, pp. 28, 56). Subsequently, Mr. Taylor was again contacted by Mr. Kesselman, this time for permission to extend the existing KLIQ ground system onto OYC property. No permission or option was ever granted by OYC for this purpose by Northwest Indian Women (Joint Exhibit 1, pp. 57, 58 and 59). The record is somewhat confused here as Mr. Taylor said he never understood Mr. Kesselman was attempting to negotiate use of OYC land for extension of the KLIQ ground system without a tower on OYC property. In any event, the extension of the ground system, in whatever form it was proposed by Kesselman, had been referred to the OYC attorney and he still had the matter under consideration and no permission of any type had been granted for this purpose (Joint Exhibit I, pp. 57, 63). The

[17] The question of the KLIQ ground system was the subject of extensive discussion in pleadings disposed of by the Presiding Judge, *Memorandum Opinion and Order* released December 8, 1982. It there appeared that because of river dredging operations the silt dredged from the river was, from time to time, dumped on the KLIQ ground site. As a result, there may be five, six or eight ground systems stacked one on top of another. There are no accurate records of the ground system or systems as installed and there was a discrepancy between what was represented in the pleadings as to the location and what was shown in the Commission files for KLIQ.

question of the tower on OYC property did not come up at this time because the directional antenna plan of Northwest Indian Women had been rejected (Joint Exhibit 5, pp. 27, 28).

27. Upon Mr. Keane's return to Mount Vernon, he learned that Northwest Indian Women was resubmitting the directional antenna amendment calling for a 360-foot tower at the OYC, to be connected to the proposed 50 kW operation on the KLIQ tower. Mr. Keane called Mr. Taylor (OYC) to discuss this development and asked him if he was aware of the potential environment, health and safety problems that might result from such an operation. In this connection, Mr. Keane stated he relayed information as to the hazards for the OYC residents which had been the subject of pleadings filed in this case and disposed of by Memorandum Opinion and Order released December 8, 1982 (Joint Exhibit 5, p. 29). Mr. Taylor appeared to be uninformed about such problems having been raised. Mr. Keane suggested that Mr. Taylor (OYC) ought to seek independent engineering advice on the question (Joint Exhibit 1, pp. 25-27, 54, 55, 72). This concludes the contact between Mr. Keane and persons involved with the Northwest Indian Women proposed use of the Oaks Park site and the adjoining land of the PG&E and the OYC.

28. In addition to the contacts between Mr. Keane and Messrs. Bollinger and Taylor, *supra.*, Mr. McClanathan also was engaged in such contacts. Mr. McClanathan is a registered Portland, Oregon engineer who was enlisted by George Frese — Valley's Consulting Engineer — to help with regard to the Northwest Indian Women site question. As far as can be determined from the record, Mr. McClanathan made the first contact in November, 1982 with individuals who controlled the land Northwest Indian Women would need for its antenna site and associated ground system. Mr. McClanathan telephoned Mr. Larry Taylor, then Vice-President of the OYC.[18] The OYC is a corporation and Mr. Taylor is a member of the Board of Directors (Joint Exhibit 1, p. 17).[19] On November 24, 1982, Mr. McClanathan telephoned Mr. Taylor (Joint Exhibit 2, p. 8). At this time, Mr. McClanathan was also working for The Navajo Nation, another party then in the proceeding and Mr. McClanathan was contacted by Mr. Frese because Mr. McClanathan had lived at the OYC from 1962-1966

[18] Mr. Taylor also used the title Vice Commodore (Joint Exhibit 1, p. 17).

[19] At the time of this call, there was already on file considerable pleadings including engineers' affidavits, which alleged the inability of Northwest Indian Women to meet the Commission's efficiency requirements with the KLIQ ground system.

and he knew a present resident — Bill Haynes. Mr. McClanathan called Mr. Haynes to see if he knew anything about the Northwest Indian Women proposal to put part of the ground system on OYC property. Haynes referred McClanathan to Mr. Taylor and this resulted in the telephone call to Taylor. It appears that while the original contact between Valley and McClanathan was with the consulting engineer, Frese, Frese had told Mr. Keane about this in a note dated November 17, 1981. As McClanathan recalled the phone call at the March, 1984 deposition, Taylor did not want to talk about the Northwest Indian Women proposal to extend a ground system through OYC property. Taylor, according to McClanathan, said he verified a lease had been given to Northwest Indian Women, but, the OYC attorney — Chuck McClure[20] was taking care of the matter. The whole telephone conversation was very brief (Joint Exhibit 2, p. 8). Mr. Taylor recalls that he was asked if permission was given to Northwest Indian Women to use the OYC property and the response was that such an agreement did exist. Also, according to Taylor, McClanathan mentioned during the telephone call that the Northwest Indian Women proposal would cause interference to television and radio but nothing was said about health hazards associated with such operation. Mr. Taylor believes that McClanathan did indicate that he was calling on behalf of a particular person or entity and believes he said he was representing a competing applicant. Mr. Taylor stated that during the telephone call with McClanathan, no offer was made to send anything to Taylor and he has had no communication with McClanathan since the call (Joint Exhibit 1, pp. 66–68).

29. On April 18, 1983, Taylor executed an affidavit on behalf of Northwest Indian Women which referred to the Taylor-McClanathan telephone call. In the affidavit, Taylor states that McClanathan asked him if he knew what he was getting into by allowing Northwest Indian Women to build their facilities near us and that there would be substantial interference problems if the new station were built (Joint Exhibit 1, Attachment 11).

30. After McClanathan's contact with Taylor, McClanthan telephoned Mr. Bollinger, owner of Oaks Park, on January 12, 1983 and on January 13, 1983, he followed up the call with a letter. According to McClanathan, he asked Bollinger if he knew anything about a proposed installation of a 50 kW radio station on his Oaks Park property. Bollinger responded that he knew

[20] Mr. McClure did not give deposition testimony in this proceeding.

nothing of such a proposal (Joint Exhibit 2, p. 9). As indicated above, this call was followed by a letter. According to McClanathan, he wanted to alert Bollinger to the problems of a 50 kW operation. McClanathan states that the information provided Bollinger in the letter was taken from pleadings filed on the Motions to Enlarge Issues which were disposed of by the *Memorandum Opinion and Order* released December 8, 1982.[21] (Joint Exhibit 2, p. 9). The text of the McClanathan letter to Bollinger is as follows:

January 13, 1983

Mr. Bob Ballinger (sic)
Oaks Amusement Park
Portland, Oregon

Dear Mr. Ballinger: (sic)

Thank you for returning my telephone call yesterday to discuss the proposed 50,000 watt radio station that Northwest Indian Women Broadcasters, Inc., intends to construct on your property and that of the Oregon Yacht Club.

NW Indian Women has applied to the Federal Communications Commission for a permit to construct a new AM radio station at Oaks Park. This radio station will operate with a power of 50,000 watts daytime and 1,000 watts nighttime using two towers, one of which will be the existing KLIQ tower and a new 355 foot high tower on OYC property just N.E. of your skating rink.

When I lived at OYC from 1962 to '66 I was aware of the existing radio interference into my electronic equipment as a result of KLIQ which operates with 5,000 watts during daytime hours. This new proposed station is *ten* times the KLIQ power and the impact to Oaks Amusement Park and OYC will be enormous. NW Indian is proposing to construct an additional tower on OYC property as shown on the attached documents and this tower will be 355 high or 100 feet higher than the existing KLIQ tower.

Connected to the new tower will be copper radial wires 150 feet in length that must be buried beneath the ground which means that the OYC parking lot, as well as a significant area of your part, will have to be plowed up.

I understand from Larry Taylor of OYC that the club has indeed given NW Indian an option to construct the new tower and place the ground radial wires on their property.

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[21] Such pleadings not only dealt with the inability of the Northwest Indian Women's Oaks Park antenna proposal to meet the Commission efficiency requirements but also there was extensive reference to the possible non-ionizing electromatic radiation or RF burns potential.

Attached are partial exhibits from the NW Indian applications to the FCC for your reference. Please note that they claim they will place additional ground wires beneath your midway walk area, around and under your oak trees and parking lot as shown in their exhibits. Obviously this would create considerable damage to your park area. Of more importance is the effect of the 50,000 watt high power radio energy in such close proximity to your public address equipment, the organ in the skating rink and other electronic equipment. Such a high intense radio field has effects on the human body which could preclude public use of the area within hundreds of feet of the KLIQ tower during daytime hours. Multnomah County recently adopted new standards in an ordinance that will make it impossible to occupy areas near such a high power radio tower and it is likely that the city of Portland may join these standards.

The attached 8 1/2 by 17 inch map of the park marked Exhibit 1 shows the area where additional ground wires will be plowed into your park. I have outlined this ground system addition in yellow for your convenience.

Obviously this proposed construction will have extreme impact on your park operations. N.W. Indian is scheduled for a hearing before the FCC in just a few weeks to determine if they will receive the construction permit to build the station. Therefore time is extremely short to bring any objection to the attention of the FCC. If the FCC grants the construction permit to NW Indian it may be too late to stop actual construction of the facility.

If you wish to comment to the FCC about the NW Indian application I suggest that you immediately make your objections known. To facilitate this you or your attorney may such to contact the following person for additional information.

Mr. Jim Keane, President
Radio Station KAPS
P.O. Box 70
Mount Vernon, Washington 98273

Telephone: 206/424-7676

Mr. Keane has an interest in seeing that the FCC in Washington, D.C. know the actual truth of the conditions at Oaks Park and he could advise you on how to proceed. Since time is very short, I suggest that you or your attorney telephone Mr. Keane immediately.

In the original application by NW Indian, prepared by their engineer Ben Dawson, they submitted a sketch of your park which I have included in the attached material. This sketch shows only the skating rink and gives the FCC the impression that nothing else exists at the park. In fact, they describe the surrounding area as marsh and low land.

Please feel free to call me if I may provide you with any additional information concerning this matter. Mr. Keane and I would be available to meet with you or your representatives if you desire.

Sincerely,

Bob McClanathan, P.E.

cc: Jim Keane, w/out exhibits
George Frese, P.E., w/out exhibits

Mr. Bollinger was deposed and his deposition is in evidence. Mr. Bollinger is 74 years of age and he has been engaged in an estate planning project at Oaks Park for the past five years. This project will take over the Oaks Park land. Thus, Mr. Bollinger intends to make no commitments or leases on Oaks Park land until the estate planning project is in place. To this extent, Mr. Bollinger has not renewed a term lease with KLIQ and KLIQ now has a lease on a month-to-month basis. Mr. Bollinger has not been approached by anyone from KLIQ or Northwest Indian Women with respect to the proposed use by Northwest Indian Women of the KLIQ facilities. Other than rumors, the first printed matter about the Northwest Indian Women proposal was the McClanathan letter. Mr. Bollinger states that McClanathan's reference to the OYC in the January 13, 1983 letter did not result in any planned discussion with Mr. Taylor (OYC). However, Mr. Bollinger did meet with Mr. Taylor after receipt of the letter to discuss the easement across Oaks Park land necessary to reach the OYC by land. During those discussions, Bollinger indicated to Taylor that he was opposed to the Northwest Indian Women use of Oaks Park but there was no discussion about Northwest Indian Women use of OYC property (Joint Exhibit 4, p. 13).

31. The record is clear that no one from Northwest Indian Women ever contacted Mr. Bollinger concerning use of the Oaks Park site. However, Northwest Indian Women did talk to Mr. Jack and Mr. Jack's deposition is in evidence as Joint Exhibit 3. Mr. Jack is the 100% owner of KLIQ which operates as a corporation — Tamarack Communications, Inc. (Joint Exhibit 3, p. 4). Mr. Jack states he has a "long term lease" on the Oaks Park site which runs from month to month (Joint Exhibit 3, p. 6). Mr. Jack states he granted an option to Northwest Indian Women to hook onto the KLIQ tower and use the KLIQ ground system. Mr. Jack may have discussed with Northwest Indian Women[22] the extension of the KLIQ ground system, but if such a discussion did take place, he — Mr. Jack — would not have granted permission to extend the existing ground system (Joint Exhibit 3, pp. 11-13). Further, Mr. Jack states that the option granted to

[22] All such discussions would be with Mr. Kesselman.

Northwest Indian Women was for a low power installation of either 1 kW or 5 kW, and no permission was ever given for a 50 kW operation as Mr. Jack stated he was familiar with the relative physical size of the 1 kW, 5 kW and 50 kW transmitters and there was no room for a 50 kW transmitter at the site (Joint Exhibit 3, pp. 13, 17 and 18). The option agreement between Mr. Jack and Northwest Indian Women was not contingent upon approval by Mr. Bollinger (Joint Exhibit 3, p. 19). It does appear that Mr. Jack was alerted to the 50 kW proposal by Northwest Indian Women from information provided by Northwest Indian Women Consulting Engineer, but Mr. Jack states he overlooked this (Joint Exhibit 3, pp. 34-35).

32. Mr. Kesselman negotiated with Mr. Jack and he knew there was a dispute between KLIQ and Mr. Bollinger (Oaks Park) as to the authority KLIQ had to sublease. Mr. Kesselman states that Mr. Jack assured him of the KLIQ right to sublease. Mr. Kesselman believed that Mr. Jack may have shown him his lease agreement (Joint Exhibit 5, pp. 25-29). Mr. Bollinger states that KLIQ has no authority to sublease and he believes he made this clear to Mr. Jack shortly after Mr. Bollinger received the McClanathan letter (Joint Exhibit 4, p. 18). It is Mr. Bollinger's position that Mr. Jack was advised before receiving the McClanathan letter that Mr. Jack could not renew the long-term lease and the only lease available would be on a month-to-month basis (Joint Exhibit 4, p. 27).

Conclusions

The Section 307(b) Issue

1. The mutually-exclusive proposals of Northwest Indian Women and Valley are for stations in different cities, different states with no common coverage areas.[23] In *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603 (1961), the Commission held that the "fair, efficient, and equitable" standard of Section 307(b) for radio service distribution looks to the relative needs of the respective proposed service areas for a "reception service" (no concern for a specific point of origin) and to the relative needs of the proposed communities of license for a new "transmission service" (community of license is the point of origin). The first of the *Kent-Ravenna* criteria — transmission service — measures the relative needs in terms of number of facilities, and the respective populations, in each of the competing communities. *Cherokee*

[23] Northwest Indian Women Exhibit 2 and Valley Exhibit 2-B.

Broadcasting Co., 17 FCC 2d 121 (1969). The Commission has held that the need for a second radio station in a community with a population of only 2,568, outweighed that for a ninth station in a much larger city (population 99,865). *Babcom, Inc.*, 27 FCC 2d 437 (Rev. Bd. 1971). However, the presumption of need does not result in an automatic preference and must be weighed against any countervailing factors. *Bie Broadcasting Company*, 81 FCC 2d 1 (Rev. Bd. 1980). In other words, the presumption is rebuttable or as the court put it in *Harrell* v. *FCC*, 267 F. 2d 629 (D.C. Cir. 1959), the Commission must still make a determination of the relative needs of those communities and the relative abilities of the applicants to meet those needs.[24]

2. Valley urges in its conclusions that a comparison of the number of services in each community and the comparative population is dispositive of the Section 307(b) issue. Cases such as *Bie Broadcasting Co.* and *Harrell* dictate that this is not the case.

3. The record shows that Valley would provide the second nighttime transmission service to Mount Vernon (population 13,009). Northwest Indian Women would provide the twentieth aural transmission service to Portland (population 366,343). It is necessary to here deal with the conclusions proposed by Northwest Indian Women. Northwest Indian Women would conclude that Valley's proposed nighttime service to Mount Vernon would be the third and not the second service. Northwest Indian Women offered no evidence while the hearing record was open on the claimed additional transmission service. Rather, it requests in its Proposed Findings and Conclusions that official notice be taken of the existence of a non-commercial FM station in Mount Vernon. Valley argues that the non-commercial FM station is an 18 watt station and if official notice is to be taken of non-commercial FM stations, Portland has four such facilities which would increase the total aural transmissions facilities serving Portland from 20 to 24. Northwest Indian Women's request for official notice of a non-record fact is neither fair nor equitable. The existence of this non-commercial station was not beyond reasonable controversy and official notice requests after the record is closed should be reserved for adjudicative facts which are beyond reasonable controvery. Even assuming *arguendo* that the Northwest Indian Women request for offical notice in this instance is proper, consideration of non-commercial stations for Section 307(b) pur-

[24] For an example of a situation where a second service to a community outweighed the other community's need for a first local service, see *Wilmer E. Huffman*, 32 FCC 1 (1962).

poses is not relevant. See *Kaldor Communications, Inc.*, 98 FCC 2d 292, 994 (Rev. Bd. 1984). Northwest Indian Women urges in its Reply Findings that the *Kaldor* decision and the cases cited therein failed to take into account cases such as *Fort Harrison Telecasting Corp.* v. *FCC*, 324 F. 2d 379 (1963), *cert. denied* 376 U.S. 915 (1964) and *FRC* v. *Nelson Bros. B&M Co.*, 289 U.S. 266 (1933) where it was held that the Commission is required to consider all assigned broadcasting facilities. Thus, the *Kaldor* decision, according to Northwest Indian Women, is not controlling with respect to the non-consideration of non-commercial broadcast services.

4. The Presiding Judge finds the language of *Kaldor* is clear and there does not exist the limitations urged by Northwest Indian Women in considering non-commercial services. Accordingly, non-commercial stations are not considered herein. The 20 services in Portland include four 50 kW facilities. Thus, Valley merits a 307(b) preference in this regard and Northwest Indian Women deserves none.

5. Turning to the reception aspect of the 307(b) issue, the Northwest Indian Women proposal would provide first, second and third services, daytime to more areas. Valley would reach five times as many people, nearly twice as many with a second and more than three times with a third. An applicant proposing to serve the greater population is to be preferred over one which would serve a larger area but with fewer people. *Meredith Colon Johnson*, 33 FCC 2d 324 (Rev. Bd. 1972), aff'd 39 FCC 2d 782 (1973).

6. Unless the record reflects some other matters which should be considered under the Section 307(b) issue, Valley must prevail on the issue. Northwest Indian Women does show that Portland is an important city in the Pacific northwest but such showing does not outweigh the 307(b) preference awarded to Valley. Northwest Indian Women, however, would insert another preference which it urges should be given substantial decisional weight in awarding the 307(b) preference to Northwest Indian Women. The Section 307(b) issue permits evidence on the need for a new transmission service primarily on the relative need for a new service in the light of the number of services in each of the communities and the resepctive populations of each community. In addition, evidence should be introduced which would demonstrate sufficient sociological or economic evidence which would serve to introduce an additional element into the 307(b) weighing

process.[25] In effect, 307(b) involves the comparison of the needs of the respective communities and not the comparative qualifications of the applicants. Such considerations, however, are pertinent to a comparison of applicants for the same community. This assumes importance here, as Northwest Indian Women urges that the Commission in *Clear Channel Broadcasting*, 78 FCC 2d 1345, (1980), added a new non-technical service objective in Section 307(b) considerations. Thus, when the Commission made available the clear channel at issue here, it mandated, according to Northwest Indian Women, that one of the transmission needs to be considered is the need for the voice of minority owned stations in the nation's larger cities. Thus, urges Northwest Indian Women, the *Clear Channel* decision is little more than "fools gold" unless Section 307(b) choices are expanded into the area of minority ethnic preferences. Northwest Indian Women's argument in this respect was rejected in *WHW Enterprises, Inc.*, 89 FCC 2d 799, 809-810 (Rev. Bd. 1982). This position of Northwest Indian Women also finds no support in the Commisison's decision in *Waters Broadcasting Corporation*, 91 FCC 2d 1260 (1982).

7. In summary, it is concluded that if Valley is found to be an otherwise qualified applicant, the Section 307(b) issue is dispositive, without consideration of the contingent comparative issue and the grant will be made of the Valley application.

The Contingent Comparative Issue

8. The contingent comparative issue assumes a decisional part in this proceeding only in the event a choice among the two applicants should not be based solely on considerations relating to Section 307(b). In this event, the issue requires a determination as to which of the overlapping proposals would, on a comparative basis, best serve the public interest. Initially, it is clear that the two applications involved here concern proposed service to different cities and states namely: Mount Vernon, Washington and Portland, Oregon. An examination of the engineering exhibits from Northwest Indian Women (Northwest Indian Women Exhibit 2) and Valley (Valley Exhibit 2-R) demonstrates that the presently two remaining applicants in the proceedings do not have overlapping proposals, and the further examination of the applicants under the contingent comparative issue is thus questionable. However, the issue is in the case and the hearing record does contain facts which can be considered should a reviewing author-

[25] See for example, *Robcon, Inc., supra.*

ity take these matters into consideration. Valley proposed no conclusions of law on the contingent comparative issue, urging that the case turns solely on Section 307(b) considerations.

9. Neither Northwest Indian Women nor its sole principal have any connection with other media of mass communications. Valley has offered no evidence under this aspect of the contingent comparative issue. Thus, Northwest Indian Women is awarded a substantial diversification preference.

10. On the criterion of best practicable service, Northwest Indian Women's sole 100% stockholder would integrate full-time (40 hours or more a week) into the day-to-day operation of the proposed station as the General Manager. The integration is enhanced by Ms. David's status as an American Indian female. Further, Ms. David proposes to move to Portland in the event of a grant. Her claimed past broadcast experience is entitled to no enhancement credit since it occurred between 1969 and 1970 as a part-time announcer. This is too remote in time and of a limited nature so that it does not merit consideration in the comparative consideration.

11. Valley proposed to integrate full-time, Mr. James Keane, Valley's 40% stockholder, President and General Manager of its present operation. Mr. Keane now resides in the service area of Valley's proposed station. Further enhancement of Valley's proposal results from Mr. Keane's demonstrated record of civic activity in the Mount Vernon area and substantial past broadcast experience at important supervisory levels.

12. In summary, Northwest Indian Women is to be substantially preferred on the diversification criteria. Likewise, Northwest Indian Women rates a substantial preference in integration by virtue of the 100% integration proposal of Northwest Indian Women versus the 40% proposal of Valley. Northwest Indian Women's integration preference is enhanced by her minority ethnic status as an American Indian. While Valley is entitled to enhancement credit for local residence, civic activities and past broadcast experience, such enhancements do not counter the 60% difference between Valley and Northwest Indian Women on integration of ownership and management; i.e., Valley — 40% and Northwest Indian Women — 100%. Northwest Indian Women is the preferred applicant on the contingent comparative issue.

The Waiver of Section 73.21 Issue

13. Section 73.21(a)(2)(ii)(c) of the Rules is as follows:

> "(C) The nighttime power of Class II-B stations which are authorized after June 1, 1980, to operate in any of the contiguous 48 states on any of the Class I channels listed in Section 73.25(a) and which do not meet the requirements for primary service set out in Section 73.37(e)(2)(i), shall not exceed 1 kW".[26]

14. The legal arguments advanced by both Northwest Indian Women and Valley deal with the question of just what is required for a waiver of Section 73.21(a)(2)(ii)(c) of the Rules. Northwest Indian Women claims that the test for waiver of the cited Rule requires only that Northwest Indian Women demonstrate (1) that the nighttime power in excess of 1 kW is necessary to provide principal city service and (2) that the power required will not impede the Commission's allocation objectives. Northwest Indian women cites *Kay-Smith Enterprises*, 52 RR 2d 1685-88 (1983)[27] in support of its view. The *Kay-Smith* citation deals with a hearing designation order in which the following language appears:

> Kay-Smith proposes 10 kilowatts nighttime power. Recognizing that Section 73.21(a)(2)(ii)(c) limits new Class II-B stations on the clear channels to 1 kW nighttime power, KXL requests a waiver of this rule. The Commission has adopted a strict standard for waiver requests of this nature, however. Thus, waivers will be granted only upon a showing that the higher power proposed is necessary to provide principal city service and will not impede our allocation objectives. While Kay-Smith has established compliance with the first part of the "test" it has not sufficiently supported its claim that the higher power will not preclude other possible co channel, unlimited time Class II assignments. Therefore, an appropriate issue will be specified. (52 RR 2d at 1688).

15. The problem with applying the test set forth in the *Kay-Smith* case is that this is a Hearing Designation Order not published in the FCC Reports and thus, pursuant to Section 1.14 and 0.416 of the Rules, has no precedential significance. Northwest Indian Women cites other similar cases which again deal with unpublished designation orders. Thus, does the test of *Kay-Smith* apply or does the test involving waiver of similar Commission Rules, but not the same Rule, apply. It is clear that an applicant for a waiver of any Commission Rule faces a "high

[26] The frequency at issue here involves a Class II channel listed in Section 73.25(a) of the Rules.

[27] While *Kay-Smith* is reported in Pike and Fisher, it is not reported in the FCC reports. Other similar cases upon which Northwest Indian Women relies can be cited only by the FCC number.

hurdle even at the starting gate." See *WAIT Radio* v. *FCC*, 418 F. 2d 1153 (D.C. Cir. 1969). When an applicant requests a waiver of rule, it must plead with particularity the facts and circumstances which would warrant waiver of that rule. *Rio Grande Family Radio Fellowship* v. *FCC*, 406 F. 2d 664 (D.C. Cir. 1968). There are a group of cases reported in the FCC Reports which do satisfy the test of Sections 1.14 and 0.416 of the Rules. Such cases do not deal specifically with Section 73.21 of the Rules, but, rather the closely paralleled situation involving a rule waiver so that the FM station may operate from a site which is short-spaced. Here, the FM applicant must provide "concrete support", preferably documentary evidence, that no site is available from which service can be provided in accordance with the Rules. *Roswell Broadcasting Co., Inc.*, 45 FCC 2d 797 (1974), reconsidered on other grounds *sub nom Berrendo Broadcasting Co.*, 52 FCC 2d 433 (1975). Before a waiver request of this kind can be granted; i.e., FM short-spacing, the Commission uniformly requires the applicant from real estate agents, landowners or other disinterested parties to establish that no other sites are available which would comply with the Commission's Rules. *Townsend Broadcasting Corporation*, 62 FCC 2d 511 (1976) and *Stearns County Broadcasting Co.*, 71 FCC 2d 412 (1979).

16. These waiver standards are not limited to short-spaced FM transmitter sites, as urged by Northwest Indian Women, but apply equally in other cases where an applicant claims there are no available sites from which it can operate according to the rules. See for example, *WSET, Inc.*, 80 FCC 2d 223 (1980), a case involving an applicant for a television station, which relies on the *Townsend* case.

17. Applying the waiver standards from FCC reported cases such as *Townsend* and *WSET, Inc.*, Northwest Indian Women has not met the test for waiver of Section 73.21 of the Rules. Northwest Indian Women's Waiver Exhibit 1 is the only evidence in the record concerning efforts to locate a site which does comply with the 1 kW nighttime power limitation rather than the 5 kW it is seeking. This exhibit is prepared by Mr. Kesselman who is the former husband of Northwest Indian Women's sole principal, Ms. David, and Northwest Indian Women's corporate counsel. He has more than a casual interest in the outcome of this proceeding. The Waiver Exhibit 1 provides only self-serving and conclusionary statements. It is unknown from the record (1) what specifically constituted Northwest Indian Women's search area; (2) what sites were considered; (3) were the owners contacted; (4) what informa-

tion was provided; (5) what information was provided by Northwest Indian Women; (6) was the search less than exhaustive because of the shortness of time; (7) why each site was deemed "unsuitable" or "unavailable"; (8) to what extent did the expense of specific sites and lack of finances contribute to a give site being deemed "unacceptable" (9) on what basis did Northwest Indian Women conclude that no sites were available and (10) are there any documents which would assist the Commission in assessing the waiver request. One puzzling aspect of this entire matter is the fact that Valley had no objection to the introduction of Northwest Indian Women's Waiver Exhibit 1 and requested no cross-examination of its sponsor, Mr. Kesselman, pursuant to a speakerphone procedure suggested by the Review Board in its *Memorandum Opinion and Order* released January 31, 1985 (FCC 85R-9). However, it is the Commission standards which must be satisfied for a rule waiver and not the fact that a party to a proceeding allows an exhibit to come into the record without objection which does not satisfy the waiver test. Otherwise, parties in a hearing proceeding would be establishing the test for a rule-waiver rather than the Commission.

18. Northwest Indian Women has failed to meet the test for rule-waiver as set out in cases such as *Townsend* and *WSET*. Northwest Indian Women has met the test for rule-waiver as set out in unreported cases such as *Kay-Smith*. The cases as reported in the FCC Reports are deemed controlling on the waiver issue. See Sections 1.14 and 0.416 of the Rules and note particularly that part of Section 0.416 of the Rules which provides in part:

> "All documents currently adopted by the Commission having precedential or historical significance are published in the FCC Reports . . . "

In summary, Northwest Indian Women's request for waiver of Section 73.21(a)(2)(ii)(c) will be denied.

Investigative Issues

19. Issues (a), (b) and (c), as added by the December 14, 1983 *Order* will be resolved favorable to Valley. The Valley investigation started when Mr. Keane became aware of Ms. David's sworn statement that she had permission to extend the KLIQ radials onto ground owned by PG&E and the OYC. Mr. Keane's investigation based on the facts of record in the case, demonstrated that Northwest Indian Women did not have permission to extend the radials onto these two pieces of property and it is doubtful if there was such permission granted by PG&E and the

OYC that Northwest Indian Women could extend the radials since Mr. Jack of KLIQ who leased the Oaks Park land on a month-to-month basis would not grant such permission and the owner of the land — Oaks Park — would not grant permission. It must be kept in mind here the nature of what brought about the decision of Northwest Indian Women to extend the KLIQ radials. The efficiency of the existing KLIQ ground system had been placed in issue insofar as Northwest Indian Women originally proposed to use the existing KLIQ ground system for its 50 kW operation. Northwest Indian Women's answer, by way of amendment, after the efficiency issue was added, was to extend the length of the radials. This required the need to negotiate with those in control of two adjoining pieces of property, namely; PG&E and OYC. Valley's investigation concerned the ability of Northwest Indian Women to extend the radials and the investigation showed such authority had not been obtained by Northwest Indian Women contrary to Ms. David's sworn statement. Northwest Indian Women urges that Valley lacked candor when it filed a pleading with the Commission which did not include information on the negotiation which had taken place by Mr. Kesselman on behalf of Northwest Indian Women. Even accepting Northwest Indian Women's argument which is not supported by the record, the fact and the conclusion remains that Northwest Indian Women did not have the permission to extend KLIQ radials onto land owned by PG&E and OYC. Mr. Kesselman's testimony that he did obtain the permission of PG&E and OYC for the extension of the radials is rejected. Mr. Kesselman at best gave confused and incomplete information of what Northwest Indian Women was proposing insofar as Mr. Jack (KLIQ), Mr. Taylor (OYC) and Messrs. Fishback and Larsen (PG&E) are concerned. Messrs. Larsen and Fishback had both indicated a desire to cooperate with Mr. Kesselman, if they could get some information which was never provided. Mr. Taylor indicated that questions concerning the extension of radials onto OYC land should be directed to counsel for OYC and the OYC counsel did not testify. Mr. Jack also may have talked with Mr. Kesselman about extension of the KLIQ radials and he would have said no to such a proposal. Every witness, except Mr. Kesselman, contradicts Mr. Kesselman on the permission to extend the KLIQ radials. Mr. Kesselman had an interest in the outcome of this proceeding.[28] The other witnesses had no interest in the outcome of the proceeding and

[28] Such interest was never made clear except Mr. Kesselman acted as Ms. David's attorney and he conducted all negotiations for the antenna site.

attempted to cooperate with Mr. Kesselman, based on what sketchy information was provided. The one witness in this proceeding who appeared to be the key to the entire Northwest Indian Women Oaks Park antenna proposal was Mr. Bollinger and he was never contacted by Northwest Indian Women and knew nothing of the Northwest Indian Women project, except some rumors, until he was advised by Valley of the Northwest Indian Women proposal.

20. Northwest Indian Women has also sought to introduce into this hearing that Valley went far beyond the bounds of a proper investigation when it resorted to scare tactics as to possible so-called RF burns to members of the public and that the existing KLIQ radials may stop short of the common property lines with PG&E and OYC. It is argued that such tactics on the part of Valley cause Northwest Indian Women to lose its antenna site at Oaks Park and the adjoining property. Northwest Indian Women claims that Valley spread false stories about the KLIQ radials not extending up to the Oaks Park property line, thus excavation on the Oaks Park property would be required to find the existing radials when Valley is alleged to have known all the time such was not true. Further, Valley engaged Mr. McClanathan to spread such scare stories. The record shows that there were extensive pleadings by KMO, The Navajo Nation and Northwest Indian Women all addressed to the question of RF burns and the general inability of anyone to provide valid information about exactly where the present KLIQ ground system was located. All such pleadings were a matter of public knowledge from matters on file with the Commission in connection with two Motions to Enlarge Issues which were disposed of by *Memorandum Opinion and Order* released December 8, 1982 (FCC 82M-3880). The pleadings also dealt at length with the possibility of RF burns.[29] Northwest Indian Women never showed where the KLIQ existing ground system was located. It was alleged that the Commission's files on the ground system did not agree with what Northwest Indian Women said was there. As to RF burn problems, Northwest Indian Women made none of these matters known to parties it was dealing with on use of the land. Efforts by Valley to locate the radials proved inconclusive since actual measurements were not possible because current from the ground system was leaking into vertical steel structures at the site. Mr. McClanathan is an

[29] No issue was added on the RF burn question since it appeared the parties were urging that the RF emissions for the ground system would violate a Portland, Oregon standard. Thus, primary jurisdiction would be with that tribunal.

experienced engineer and he has experience with RF burn problems. He described the possibility of burns with a 50 kW operation such as Northwest Indian Women proposed. This testimony has not been rebutted other than to label it as part of a scare program.

21. Thus, when Valley contacted representatives of Oaks Park, OYC and the PG&E, it had reasonable basis to advise the Commission that Northwest Indian Women did not have the permission to extend the KLIQ radials. Further, when Valley did make such contacts and found that OYC and PG&E knew little of the actual Northwest Indian Women proposal and, other than rumors, Mr. Bollinger knew nothing of the proposal, it was appropriate to advise them of the nature of the Northwest Indian Women proposal and what the hearing record so far reflected about this proposal. The record contains no support for the scare tactics charged to Valley by Northwest Indian Women.

22. There is no question that Valley and its principals and agents are responsible for the accuracy and reliability of the representations they make to the Commission whether based on their own knowledge or that of third parties. See *WHW Enterprises* v. *FCC.*, 753 F. 2d 1132, 1139 (D.C. Cir. 1985); *RKO General, Inc.* v. *FCC*, 670 F. 2d 218, 231 (D.C. Cir. 1985), *cert. denied* 456 U.S. 927 (1982). Further, where serious misrepresentation claims are made concerning an applicant before the Commission, there is an obligation to probe deeper into the statements before making serious misrepresentation claims made by Valley against the Northwest Indian Women proposal. See *Gross Telecasting, Inc.*, 34 RR 2d 1428 (Rev. Bd. 1975) (55 FCC 2d 76 (1975). However, as the evidence indicates the matters developed by Valley as to Northwest Indian Women's proposal were based on a reasonable probing of the facts by either principals or reliance on information developed by professional engineers based on either on-site inspection or extensive experience with the possibility of RF burns.

23. Northwest Indian Women placed itself in an adverse position and thus, exposed itself to a reasonable and proper investigation of its application and representations made therein. An applicant must be afforded wide scope in this regard and the Commission has held an investigation to be proper and permissible, even though the investigation techniques were "disturbing". *Chronicle Broadcasting Co.*, FCC 2d 775. The investigation as conducted by Valley was reasonably related to an objective of the proceeding; i.e., to determine the bona fides of the Northwest

Indian Women transmitter site at Oaks Park and adjoining property. Valley's President, Mr. Keane, had advice from qualified consulting engineers seriously questioning the proposed high power operation in the Oaks Park environment. He — Mr. Keane — knew that Northwest Indian Women had ignored the Oaks Park land owner — Mr. Bollinger — in the Northwest Indian Women proposal for Oaks Park and had valid reasons to suspect that Northwest Indian Women lacked the land use permission it claimed. It turns out that Northwest Indian Women did not have the permission to extend the radials onto adjacent properties, and could not make use of the Oaks Park land. Hence, the investigation in these regards was both justified and fruitful.

24. Accordingly, it is concluded that the investigation was reasonable in the subject matter, scope and technique and that Valley had a right to conduct it and it was so conducted within parameters of acceptable inquiry in an adversary proceeding.

Summary of Conclusions

1. The Section 307(b) issue is resolved favorable to Valley and the issue is dispositive of the case, assuming Valley is otherwise qualified;

2. The contingent comparative issue is not decisional on the facts of this proceeding, but if considered, it would be resolved favorable to Northwest Indian Women;

3. The Waiver of Section 73.21 issue is resolved against Northwest Indian Women; and

4. The Investigation Issues are resolved favorable to Valley and with the favorable resolution of this issue, Valley is found to be an otherwise qualified applicant.

25. Accordingly, IT IS ORDERED, that unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Valley (File No. BP-801112AB) IS GRANTED and the application of Northwest Indian Women IS DENIED.[30]

FEDERAL COMMUNICATIONS COMMISSION

BYRON E. HARRISON, *Administrative Law Judge*

[30] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 CFR 1.276(d).

Application, For Review
Fairness Doctrine
Personal Attack

Application for review of Mass Media Bureau's ruling of December 23, 1985, granting assignment of broadcast license of WZZM-TV, Grand Rapids, Michigan, and denying petition to deny application to assign that license, finding no violation of Fairness Doctrine or personal attack rule denied. Commission affirmed Bureau's ruling as correct and finds application does not contain sufficient grounds to warrant reversal or modification.
—*Wometco WZZM, Inc.*

FCC 86-288

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
WOMETCO WZZM, INC.	File No. BALCT-850513KK
and	
WESTERN MICHIGAN BROADCASTING CORPORATION	
For Assignment of Television Broadcast License	

ORDER

Adopted: June 6, 1986; Released: June 19, 1986

BY THE COMMISSION:

1. The Commission has before it an application for review filed by Calvin F. Deitz on January 16, 1986, seeking review of the Mass Media Bureau's ruling of December 23, 1985.* The Bureau granted assignment of the broadcast license of WZZM-TV, Grand

* A copy of that ruling is attached.

Rapids, Michigan, and denied Mr. Deitz's petition to deny the application to assign that license, finding no violation of the Commission's Fairness Doctrine or personal attack rule.

2. After a careful review of the petition we believe that the Mass Media Bureau's ruling was correct, and the application for review does not contain sufficient grounds to warrant reversal or modification. Mr. Deitz's application for review is clearly lacking in two essential regards. First, he has presented no information to show that the discussion involved a "controversial issue of public importance" as that term has been interpreted by the Commission. While he has furnished a voluminous amount of material in an attempt to demonstrate the controversiality and public importance of this programming, none of it establishes that WZZM-TV had been unreasonable in determining that the issues discussed had not generated the requisite level of debate in Grand Rapids. For example, Mr. Deitz has alleged that the Bureau erred by ignoring a petition he submitted signed by 500 residents of Newaygo County. However, the petition neither mentions Mr. Deitz nor the subject matter of the investigative series. Moreover, it was not circulated until four years after the series was aired. Secondly, the reports were broadcast as part of a bona fide newscast, programming explicitly exempted from the personal attack rule. The Commission has stated that decisions about which particular material to place within a newscast are properly within a broadcaster's discretion, unless there is a showing of bad faith or unreasonableness. *Central Intelligence Agency*, 58 RR 2d 1544, 1552 (1985). No such showing has been made. Furthermore, news stories contained in otherwise exempt bona fide newscasts do not lose their exempt status because they involved investigation or lacked spontaneity. *Id.* app. at 8, n.10. *See also Citizens for Reagan*, 58 FCC 2d 925, 927 (1976). Therefore, pursuant to Section 1.115(g) of the Commission's rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

ATTACHMENT

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Wometco WZZM, Inc. (Assignor) and Western Michigan Broadcasting Corporation (Assignee) For Assignment of License of Television Station WZZM-TV, Grand Rapids, Michigan	File No. BALCT-850513KK

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1985; Released: December 23, 1985

BY THE CHIEF, MASS MEDIA BUREAU:

1. The Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the above-noted application seeking authority to assign the license of WZZM-TV, Grand Rapids, Michigan, from Wometco WZZM, Inc. (Wometco) to Western Michigan Broadcasting Corporation; (b) a petition to deny filed by Harvey A. Bergren, D.O. (Bergren); (c) a petition to deny filed by Donald L. Pederson (Pederson); (d) a petition to deny filed by Calvin F. Deitz (Deitz); and (e) responsive pleadings.[1] [2]

[1] We have determined that the petitioners have standing in this matter. *See United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966).

[2] Petitions to deny were also filed by Dr. James A. Nutt, D.O.; Dr. A. J. Scarchilli, D.O.; Dr. John Conroy, D.O.; and Dr. Gary Coller, D.O., jointly; by Robert A. Lado, D.C., individually; by Dr. Grant R. Born, individually; and by Ferris E. and Irene V. Traylor. These petitions have been withdrawn. We, however, have fully considered the matters set forth in these petitions and conclude that there are not substantial and material questions of fact that would require further inquiry.

Petition to Deny filed by Bergren

2. Bergren is a osteopathic physician and surgeon. Bergren alleges that, in November of 1984, he was contacted by Mark Lagerkvist, a reporter for WZZM-TV, who informed him that he was doing an investigative report on Bergren and requested an interview with him. Subject to certain stipulations, Bergren agreed to the interview. Bergren states that WZZM extensively advertised its program, "The Medicine Man," which dealt with Bergren, and that these advertisements charged that Bergren used unsafe drugs, which were soon to be taken off the market. The program was broadcast by WZZM in the third week of November and was presented in segments during the station's "Eye Witness News" program. Bergren claims that each segment discussed him in the context of controversial medical and health care and that, during each segment, numerous unsupported and needless attacks were made on his honesty, character and integrity.

3. Bergren's petition was treated as a personal attack complaint by the staff of the Fairness/Political Programming Branch, Enforcement Division of the Mass Media Bureau. By letter dated November 7, 1985, Bergren's petition was denied. In view of the foregoing, and with nothing new being presented here, Bergren's petition will be denied since its substance has already been fully considered.

Petitions to Deny filed by Pederson and Deitz

4. The petitions to deny filed by Deitz and Pederson arise from WZZM-TV's broadcast of a series of investigative news reports entitled "King of Newaygo," which was aired in November 1980, during the station's "Eye Witness News" program.[3] Deitz was a real estate broker at that time and had developed a substantial real estate business in Newaygo County, Michigan. Deitz contends that he was personally attacked during this program with having undue and illegal influence over the police and courthouse personnel of Newaygo County and having a grip on the criminal justice system and influence with judges, prosecutors and police. Deitz asserts that "these editorial opinions involved *controversial issues of public importance* within the meaning of the personal

[3] Deitz had previously brought this matter to the Commission's attention. By letter of the staff of the Complaints and Compliance Division or the Broadcast Bureau (now the Mass Media Bureau), dated January 27, 1982, Deitz was informed on how to file a personal attack complaint. With the exception of the subject petition, nothing since that time has been filed with the Commission.

attack rule of the Federal Communications Commission, and were not exempt from the personal attack rule as *bona fide* newscasts,' having taken six months to prepare as an editorialized documentary," citing *In re Amendment of Rules*, 12 FCC 2d 250, 252 (1968); *United Church of Christ v. CBS, Inc.*, 54 RR 2d, 411, 413 n. 1 (MMB 1983) *reconsid. denied, sub nom. Avery D. Post v. CBS, Inc.*, 55 RR 2d 1357 (1984); and *Red Lion Broadcasting, Inc. v. F.C.C.*, 395 U.S. 367 (1969). Moreover, Deitz declares that they were not labeled editorial, but were, together with the 10-part series, interspersed and "camouflaged" in the newscasts of WZZM-TV.

5. Pederson was employed at the time of WZZM-TV's broadcast, as a Lieutenant with the Michigan State Police and was the Post Commander at the Newaygo State Police Post. Pederson states that the editorials attacked his honesty, character and integrity by accusing him of being bribed through gifts, money and favors. Based on these editorials, Pederson contends that the fairness doctrine and personal attack rule have been violated for the past five years.

6. In opposition to the petitions of Deitz and Pederson, WZZM states that, since the news program giving rise to the complaint occurred in 1980, the petitions are untimely. WZZM asserts that Section 73.1920 requires the target of the attack establish: (1) the alleged attack occurred during the presentation of views concerning a controversial issue of public importance; (2) the broadcast is not exempt under the rule's exemption for *bona fide* newcasts; and (3) the person or group was not offered a reasonable opportunity to respond over the licensee's facilities. Further, WZZM contends that neither Deitz nor Pederson has demonstrated that the attack occurred during the presentation of views concerning issues of public importance, citing *United Church of Christ v. CBS, Inc.*, above, at 413. WZZM maintains that neither has shown that the broadcast was not exempt from the personal attack rule, citing *Central Intelligence Agency*, 57 RR 2d 1543, 1548 n. 10, *recon. denied*, FCC 85-374 (released September 11, 1985). In addition, regardless of the views of the station's management, a statement of an employee or commentator is not a station editorial unless it is stated to be the views of the licensee, citing *Robert W. Healy*, 44 RR 2d 1109, 1111-1112 (1978). Moreover, WZZM declares that, when it took up the investigation, its news staff members attempted to interview both Deitz and Pederson and that they therefore had an opportunity to respond.

7. The personal attack rule, Section 73.1920 is the component of the Fairness Doctrine that requires licensees to provide notice and an opportunity to reply whenever during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group. The general Fairness Doctrine imposes an obligation on broadcasters to present opposing points of view, but the licensee may select the person or method of presenting those views; the personal attack rule designates the persons attacked as "natural opposing spokesmen" and gives them the personal right of reply. *See In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC2d 1, 16 (1974), *reconsid. denied*, 58 FCC2d 691 (1976), *aff'd in part and remanded in part sub nom. National Citizens Committee for Broadcasting v. F.C.C.*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (hereinafter Fairness Report). As a corollary of the general Fairness Doctrine, the rule is intended to insure that the public is informed about important issues; it is not intended to air private disputes or to serve as a substitute for defamation actions. *See Healy v. F.C.C.*, above, at 922-923; *Central Intelligence Agency*, above, at 1547 n. 9; *Fairness Report*, 48 FCC2d (1974) 12 n.11; *Personal Attacks*, 8 FCC2d 721, 722, 725 (1967). The limited scope of the rule is consistent with the principles of the First Amendment and congressional intent to allow licensees the maximum editorial freedom consistent with their role as public trustees. *See Strauss Communications, Inc. v. F.C.C.*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

8. Even if we were to find that there was a personal attack made during the presentation of a controversial issue of public importance, the complaint must fail. If a broadcaster airs an attack upon the honesty and character of an identified person, it is the duty of the broadcaster to notify the person of the attack and afford him an opportunity to respond. However, if the attack is made during a *bona fide* newscast the events are exempt from the personal attack rule. In that regard, we disagree with Bergren's argument that the investigative report, which was broadcast in segments during the news show, lost its exempt status. The Commission exempted *bona fide* newscast, *bona fide* news interviews, and on-the-spot coverage of *bona fide* news events from the Personal Attack rule to prevent any possible inhibiting effect it might have upon robust, unfettered news

journalism. *Bona fide* news documentaries were not exempted because the Commission recognized that they are assembled over long periods of time during which the broadcaster has sufficient opportunity to seek out contrasting points of view, particularly those of the person or group attacked. *See In re Amendment of Rules*, above, at 252 (1968). This does not mean, however, that any news story contained in an otherwise exempt category which may have involved investigation, or somehow lacked total spontaneity, must be treated like a news documentary. If this were the case, a broadcaster would have to apply some hypothetical yardstick to every news story and reach a determination of whether it should be labeled *bona fide* newscast or documentary material. Clearly, absent a showing of bad faith or unreasonableness, the licensee has the journalistic discretion as to what to include in its newscasts. *See Citizens for Reagan*, 58FCC2d 925, 927 (1976), where the Commission stated that "the inclusion of an interview within a newscast, which if broadcast outside the newscast would not be exempt, is within a station's journalistic discretion and, in and of itself, would not preclude the interview from exempt status pursuant to Section 315(a)(1) unless it has been shown that such a decision is clearly unreasonable or in bad faith."

9. Since the fairness doctrine and the personal attack rule deal with controversial issues of public importance, and that is an issue subject to vigorous debate with substantial elements of the community in opposition to one another, it would appear that any complaint involving the doctrine and rule should be filed with the commission within a reasonable time of the disputed event. Otherwise we would be required to consider fairness complaints long after the controversy has subsided, which does not serve the purpose of the Fairness Doctrine. Clearly, the petitions filed by Deitz and Pederson were submitted long after the disputed broadcast took place. However, we have reviewed the petitions and we find that neither Deitz and Pederson has established that the program involved a discussion of a controversial issue of public importance. Pederson made no attempt to establish there was a controversial issue of public importance. Pederson made no attempt to establish there was a controversial issue of public importance being discussed. Deitz stated that the editorial opinions involved controversial issues within the meaning of the rule, but set forth no evidence demonstrating the controversiality and public importance of the issues. Therefore, the complaints

must fail. Even if we were to determine that there was a presentation of a controversial issue of public importance, for the reasons set forth in paragraph 7, above, we find the licensee was not unreasonable in considering the investigative report to be part of a *bona fide* newscast and therefore exempt from the personal attack rule, Section 73.1920. Accordingly, no further action is required.

Conclusion

10. In view of the foregoing, we find that the petitions filed by Bergren, Deitz and Pederson have failed to raise any substantial and material questions of fact to establish that a grant of this application would be inconsistent with the public interest. We further find that the applicants are fully qualified and a grant of the application will serve the public interest, convenience and necessity.

11. Accordingly, IT IS ORDERED, That the petition to deny filed by Harvey A. Bergren, D.O., IS DENIED.

12. IT IS FURTHER ORDERED, That the petition to deny filed by Donald L. Pederson, IS DENIED.

13. IT IS FURTHER ORDERED, That the petition to deny filed by Calvin F. Deitz, IS DENIED.

14. IT IS FURTHER ORDERED, That the petition to deny jointly filed by Dr. James A. Nutt, D.O.; Dr. A. J. Scarchilli, D.O.; Dr. John Conroy, D.O.; and Dr. Gary Coller, D.O.; IS DISMISSED, with prejudice.

15. IT IS FURTHER ORDERED, That the petition to deny filed by Robert A. Lado, D.C., IS DISMISSED, with prejudice.

16. IT IS FURTHER ORDERED, That the petition to deny filed by Dr. Grant R. Born, IS DISMISSED, with prejudice.

17. IT IS FURTHER ORDERED, That the petition to deny filed by Ferris E. and Irene V. Taylor, IS DISMISSED, with prejudice.

18. IT IS FURTHER ORDERED, That the application assigning the license of television station WZZM-TV, Grand Rapids, Michigan, from Wometco WZZM, Inc. to Western Michigan Broadcasting Corporation, IS GRANTED.

19. Finally, copies of this Memorandum Opinion and Order

shall be sent Certified Mail — Return Receipt Requested to the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

ROY J. STEWART, *Chief, Video Services Division*
Mass Media Bureau

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